85-1730

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF NEW JERSEY,

Petitioner,

vs.

MIMS HACKETT, JR.,

Respondent.

On Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

1. Does the granting of a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 lift the collateral consequences of a state court conviction?

2. Did Congress intend that a writ of habeas corpus should do anything other than release the detainee from custody?

No.

In The

Supreme Court of the United States

October Term 1985

STATE OF NEW JERSEY,

Petitioner

v.

MIMS HACKETT, JR.,

Respondent

On Writ of Certiorari to the Superior Court

Of New Jersey, Appellate Division

PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Superior Court of New Jersey, Appellate Division, is

unpublished and appears in Appendix I, A80a. The Order of the New Jersey Supreme Court denying certification will be published and appears in Appendix J, A93a. The opinion granting the Petition for Writ of Habeas Corpus captioned Hackett v. Mulcahy, appears at 493 F. Supp. 1329 (D.N.J. 1980). A previous opinion related to this case and relied upon by the Superior Court, Appellate Division, is captioned Matter of Hackett, and is reported at 190 N.J. Super. 300, 463 A.2d 376 (App. Div. 1983). (Appendix E, A20a)

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The Order of the Superior Court of New Jersey, Law Division, granting Mims Hackett, Jr. permits to purchase and carry a handgun and to purchase other firearms was entered on April 23, 1985 (Appendix F, A59a). The Order of the Superior Court of New Jersey, Appellate Division, affirming the granting of the permits was rendered on November 21, 1985 (Appendix I, A89a). The Supreme Court of New Jersey denied a Petition for Certification on February 19, 1986 (Appendix J, A93a).

Statutes Involved

The provisions involved are lengthy and therefore their citations alone will appear at this point. Their pertinent texts are set forth in Appendix K, A95a.

28 U.S.C. §2244

28 U.S.C. §2254(a)

N.J.S.A. 2C:39-5(a),(b),and(c)

N.J.S.A. 2C:39-7

N.J.S.A. 2C:58-3(a)through(e)

N.J.S.A. 2A:170-26*

N.J.S.A. 2A:118-1*

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* Repealed September 1, 1979.

Statement of the Case

This a petition for writ of certiorari to review an opinion of the Superior Court of New Jersey, Appellate Division, which affirmed the trial court's granting Mims Hackett, Jr. permits to purchase and to carry a handgun[1] and further issuing a firearms purchaser identification card[2]. The State of New Jersey petitioned for certification in the New Jersey Supreme Court, but that

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1 In order to purchase a handgun in New Jersey, one must obtain a permit to purchase the specific handgun. N.J.S.A. 2C:58-3(a). In order to carry that handgun, a carrying permit must be secured. N.J.S.A. 2C:58-4, et seq. (Appendix K, A114a)

2 In order to purchase a rifle or shotgun in New Jersey, one must obtain a firearms purchaser identification card. N.J.S.A. 2C:58-3(b). (Appendix K, A103a)

was denied on February 19, 1986.

This case's tortured history began on May 4, 1976, when Mims Hackett, Jr. was indicted by an Essex County Grand Jury for atrocious assault and battery (N.J.S.A. 2A:90-1), kidnapping (N.J.S.A. 2A:118-1), and threatening life (N.J.S.A. 2A:113-8) (Appendix A, A1a). After a trial by jury, he was convicted of simple assault (N.J.S.A. 2A:170-26) and kidnapping (Appendix B, A6a). On January 4, 1977, he was sentenced to thirty to thirty-one years in the New Jersey State Prison for kidnapping, and to a concurrent six month term for the assault (Appendix B, A6a).

On January 4, 1977, he filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division. After a limited remand for a motion for a new trial

based on newly discovered evidence, the Appellate Division affirmed the conviction on June 19, 1978 (Appendix C, A9a). A subsequent Petition for Certification was filed in and denied by the New Jersey Supreme Court on September 19, 1978 (Appendix D, A19a). State v. Hackett, 78 N.J. 332, 395 A.2d 200 (1978).

On October 19, 1978, Hackett filed a Petition for Writ of Habeas Corpus in the United States District Court, District of New Jersey. On February 22, 1979, then Governor Brendan Byrne entered an order for commutation of sentence, reducing the sentence to two to three years. On July 17, 1979, Hackett was paroled.

On July 31, 1980, the United States District Court ordered that a writ of habeas corpus would issue unless Hackett

were retried within ninety days. Hackett v. Mulcahy, 493 F. Supp. 1329 (D.N.J. 1980). The State's subsequent Notice of Appeal to the United States Court of Appeals, Third Circuit, was withdrawn. Hackett was never retried.

On July 24, 1984, Mr. Hackett applied to the Chief of Police of Orange, New Jersey, for permits to purchase and carry a handgun. On August 9, 1984, he applied for a firearms purchaser identification card. After these applications were denied by the Chief of Police of Orange, Hackett requested a hearing in the Superior Court of New Jersey, Law Division, pursuant to N.J.S.A. 2C:58-3(d). (See Appendix K, A107a)

Hearings were held in the Superior Court of New Jersey between March 11 and

April 22, 1985.[3] The State of New Jersey argued that the applicant was barred from possessing firearms by virtue of his state conviction for the crime of kidnapping, irrespective of the granting of the writ of habeas corpus by the federal district court. As a convicted felon, he was ineligible for a permit by virtue of N.J.S.A. 2C:39-7. The permits were granted on April 23, 1985 (Appendix F, A59a).

The State of New Jersey filed a Notice of Appeal to the Superior Court, Appellate Division (Appendix H, A87a), which resulted in an opinion affirming the

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[3] All of the testimony at the hearings concerned the applicant's "need" for the permits. On appeal, the State of New Jersey did not contest the trial court's findings in this regard, and does not do so here.

granting of the permits (Appendix I, A89a). Without discussion, the Court affirmed the trial court and relied solely upon the opinion in Matter of Hackett, 190 N.J. Super. 300, 463 A.2d 376 (App. Div. 1983) (Appendix E, A20a), wherein it was held that the prior conviction for kidnapping did not bar Hackett from applying for and receiving a private detective's license.[4]

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[4] It is evident from a reading of Matter v. Hackett, 190 N.J. Super. 300, 463 A.2d 376 (App. Div. 1983), the case exclusively relied upon by the trial court here, that the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law..." Michigan v. Long, 463 U.S. 1032, 1040 (1983). It is thus clear that the Superior Court of New Jersey, Appellate Division believed that federal law required the decision as written.

REASONS FOR GRANTING THE WRIT

POINT I

THE GRANTING OF A WRIT OF HABEAS CORPUS DOES NOT NULLIFY A STATE CONVICTION AND DOES NOT, AS A MATTER OF FEDERAL LAW, LIFT COLLATERAL CONSEQUENCES OF A CONVICTION

The unique facts of this case provide this Court with the opportunity to decide a precise legal issue not considered by any reported decision in the country. Although dicta in some cases notes that the granting of a petition for writ of habeas corpus effectively nullifies a conviction, a plethora of cases holds that the purpose of the writ is to release the petitioner from custody, and nothing more.

The facts in this case are unique and therefore present a precise legal issue. Mims Hackett, Jr. was convicted of criminal offenses, unsuccessfully appealed through the state appellate process, and

was granted a federal writ of habeas corpus. The State chose not to appeal the writ and not to retry him. Then, Hackett chose to apply for permits to purchase and carry firearms. Thus, the Court is squarely confronted with the issue of whether the disabilities arising from the state court conviction survived the granting of the writ for state licensing purposes.[5] Resolution of this issue will undoubtedly effect all habeas petitioners and will effect the decision of the government whether to appeal the granting of a writ, whether to retry a defendant, or whether to do neither.

Although the State may have the power

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5 This case does not present the issue of whether fundamental rights, such as the right to vote, may be denied after the granting of a petition for writ of habeas corpus.

to grant collateral relief where a federal district court has issued a writ of habeas corpus, the granting of such relief is neither mandated nor supported by any of this Court's decisions concerning the "Great Writ." The lower court in this case relied upon the language in Carafas v. LaVallee, 391 U.S. 234 (1968), which relaxes the in-custody requirement of 28 U.S.C. §2254 and notes that a reason for the relaxation of the jurisdictional requirement was a consideration of the collateral consequences of the conviction. Carafas does not hold, nor has any subsequent Supreme Court case held, that collateral consequences of a conviction must be removed by the granting of the writ. Rather, this Court has only extended the right of a prisoner to file a petition

for a writ of habeas corpus to situations where the prisoner has been unconditionally released, so long as the actual filing occurs while in custody.

After holding that federal jurisdiction is not defeated by the subsequent release of a prisoner who files while in custody, this Court made several cryptic comments concerning the relief which can be provided upon the granting of a writ. In dicta, this Court noted that the habeas statutes do not limit the relief which "may be granted to discharge of the applicant from physical custody," id. at 239. The sole support for this comment, however, is the language of 28 U.S.C. §2243 which provides that the court shall "dispose of the matter as law and justice require," and the provision of 28 U.S.C.

§2244(b), dealing with successive petitions, which mentions "release from custody or other remedy." These general statements in the statutes lend little support to the proposition that Congress intended the habeas writ to provide anything other than release from custody. This Court did not have before it the specific question presented here.

Virtually all of the cases which have tangentially considered the effect of the writ have seized upon the comments of this Court from Carafas noted above. See United States ex rel. Hickey v. Jeffes, 571 F.2d 762 (3 Cir. 1978), and Mizell v. Attorney General of N.Y., 586 F.2d 942 (2 Cir. 1978), cert. den. 440 U.S. 967 (1979), the two cases principally relied upon by the lower courts in the present matter.

Had collateral consequences formed the primary basis for extending the "in-custody" requirement, this Court would have construed this requirement of 28 U.S.C. §2254 to permit filing after one is unconditionally released, but subject to collateral disabilities. It remains the law that one must be "in custody" in order to file a petition.[6]

The Court below failed to recognize that this Court's remarks concerning collateral consequences were made solely in the context of the "in custody" requirement of 28 U.S.C. §2254, not in the

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[6] It cannot be argued that had Hackett been unconditionally discharged, he could have filed a petition for writ of habeas corpus to eliminate the collateral disabilities of his conviction. The collateral consequences would have been beyond the reach of the federal district court even under the law as construed by the lower court here.

context of the relief that was to flow as a direct result of the granting of a writ. In relaxing the "in custody" requirement, this Court merely recognized that as a result of its action more persons would be jurisdictionally able to file petitions, more petitions would be granted, and more retrials would take place in the state courts. The removal of collateral consequences would thus come about by acquittal at retrial, rather than by operation of the writ.

The court below further cited Carafas for the proposition that "the Federal Habeas Corpus Statute, 28 U.S.C.A. §2254, was amended to provide for remedies in addition to release from physical custody." What the Carafas Court did observe was that 28 U.S.C.A. §2254(b) was

amended to speak in terms of "release from custody or other remedy." However, that provision of the habeas statutes deals with the narrow issue of the filing of successive habeas petitions and does not enjoy general applicability in the habeas context.[7] Moreover, 28 U.S.C. §2254 has not been amended to provide for "other remedies" beside that clear on its face, i.e., release from custody.

An examination of this Court's post-Carafas decisions clearly reveals that this Court intended only to broaden the access to habeas relief, not the consequences of the granting of the writ.

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[7] The legislative history of the 1966 amendment adding this language provides no insight into its purpose. See 1966 U.S. Code Cong. & Adm. News, p. 3663.

These cases continued the well established principle expressed in Fay v. Noia, 372 U.S. 391, 430-431 (1963), that "Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can only act on the body of the petitioner." (emphasis added). This Court explicitly recognized that the granting of the writ of habeas corpus does not render the state criminal judgment "void for all purposes." Id. at 423-424.

In Hensley v. Municipal Court, 411 U.S. 435 (1973), this Court held that a person who is released on his own recognizance is "in custody" for purposes of invoking habeas corpus jurisdiction.

In so holding, focus was centered on the physical restraints upon his freedom which were imposed as a result of his status. It was observed there that the custody requirement was designed to "preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty." Id. at 351. Similarly, in Preiser v. Rodriguez, 411 U.S. 475 (1973), this Court noted that Carafas and Hensley "marked no more than a logical extension of the traditional meaning and purpose of habeas corpus -- to effect release from illegal custody." Id. at 486, n. 7.

This Court's reluctance to extend the substantive scope of relief which is available pursuant to the habeas corpus statutes was expressed most recently in Stone v. Powell, 428 U.S. 465 (1976).

There, it was determined that where a state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence was obtained in an unconstitutional search and seizure. Recognizing that the prophylactic purposes of the exclusionary rule would not be further served by the federal courts' reviewing a search and seizure claim which had been reviewed by the state courts, this Court noted the limitations upon the use of the writ:

> Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government. They include "(i) the most effective utilization of limited

> judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded. [Id. at 491, n. 31, citing Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring)]

See also Allen v. McCurry, 449 U.S. 90, 98, n. 12 (1980) (the unique purpose of habeas corpus is to release the applicant for the writ from unlawful confinement); Hill v. Johnson, 539 F.2d 439, 440 (5 Cir. 1976) ("...the sole function of the writ is to grant relief from unlawful imprisonment or custody, and it cannot be used properly for any other purpose.")

CONCLUSION

For the reasons stated above, Petitioner, the State of New Jersey, respectfully requests that this Court grant the Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

GEORGE L. SCHNEIDER
ESSEX COUNTY PROSECUTOR

BY: MARC J. FRIEDMAN
ASSISTANT ESSEX
COUNTY PROSECUTOR

APPENDIX A

Indictment - Filed May 4, 1976

Superior Court of New Jersey
ESSEX COUNTY
(Law Division-Criminal)

1975Term

THE STATE OF NEW JERSEY

vs.

MIMS HACKETT JR.

Defendant

INDICTMENT (4 COUNTS)

ATROCIOUS ASSAULT AND BATTERY, KIDNAPPING AND THREATENING LIFE

A True Bill

.....

Foreman.

Plea:

Bail:

Presented: MAY 4 - 1976

APPENDIX A

Essex County, to wit:

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that MIMS HACKETT JR.
on the 29th day of August, 1975
at the City of Orange in the County of Essex aforesaid and within the jurisdiction of this Court,
did commit an atrocious assault and battery by maiming and wounding
Lawrence Moss
contrary to the provisions of N.J.S. 2A:90-1,
and against the peace of this State, the government and dignity of the same.

SECOND COUNT

And The Grand Jurors of the State of New

APPENDIX A

Jersey, for the County of Essex, upon their oath present that MIMS HACKETT JR.
on the 29th day of August, 1975
at the City of Orange in the County of Essex aforesaid and within the jurisdiction of this Court, unlawfully and feloniously did kidnap, steal and forcibly take away Lawrence Moss from the City of Orange, New Jersey and unlawfully and feloniously did carry the said Lawrence Moss to another point within the State of New Jersey, to wit: in the City of East Orange
contrary to the provisions of N.J.S. 2A:118-1
and against the peace of this State, the government and dignity of the same.

APPENDIX A

THIRD COUNT

And The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that MIMS HACKETT JR.
on the 29th day of August, 1975
at the City of Orange in the County of Essex aforesaid and within the jurisdiction of this Court, did by speech and by pointing a pistol threaten to take the life of Brian Watkins
contrary to the provisions of N.J.S. 2A:113-8
and against the peace of this State, the government and dignity of the same.

FOURTH COUNT

And The Grand Jurors of the State of New Jersey, for the County of Essex, upon their

APPENDIX A

oath present that MIMS HACKETT JR.
on the 29th day of August, 1975
at the City of Orange in the County of Essex aforesaid and within the jurisdiction of this Court, did by speech and by pointing a pistol threaten to take the life of Anthony Moss
contrary to the provisions of N.J.S. 2A:113-8
and against the peace of this State, the government and dignity of the same.

JOSEPH P. LORDI
COUNTY PROSECUTOR
BY:

APPENDIX B

Judgment of Conviction - Dated January 4, 1977

THE STATE OF NEW JERSEY)

V.)

MIMS HACKETT)

(Defendant)

ACCUSATION, INDICTMENT

OR COMPLAINT NO. 3137-75

JUDGMENT OF CONVICTION

(under N.J.S.A. 2A:170-26)

2A:118-1

The defendant, being charged on 5-4-76

on Indictment No. 3137-75 for the crime(s) of ASSAULT BATTERY

Kidnap (N.J.S.A. 2A:170-26 2A:118-1) and the defendant having pleaded ___ GUILTY X NOT GUILTY and thereafter, having on 11-

APPENDIX B

10-76, BEEN TRIED (WITH A JURY AND A (VERDICT OF GUILTY TO ASSAULT AND BATTERY AND KIDNAPPING (N.J.S.A. 2A:170-26 2A:118-1) having been rendered.

It is, therefore, on Jan. 4, 1977 ORDERED AND ADJUDGED that defendant be and he/she is hereby sentenced to:

Ct. 1 Essex County Correction Center for a term of 6 months concurrent with sentence imposed on Ct. #2

Ct. 2 not less than 30 nor more than 31 years at N.J. State Prison.

(If a State Prison sentence is imposed, include herein any recommendation with respect to the institution to which the sentence should be served: _____

_____).

REASONS FOR SENTENCE IMPOSED:* MANDATED

APPENDIX B

Defendant shall receive credit of 1 day served in custody pending disposition of the within matter.

Entered by:

_____

CLERK

John F. McTernan

Court Clerk

Form approved-Supreme Court-1976

_____

JUDGE

Ralph L. Fusco

Judge Superior Court

APPENDIX C

Appellate Division Opinion Affirming Conviction - Dated June 19, 1978

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-144-76

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MIMS HACKETT,

Defendant-Appellant.

Submitted May 15, 1978 -- Decided Jun 19 1978

Before Judges Fritz, Botter and Ard.

On appeal from the Superior Court of New Jersey, Law Division, Essex County.

Messrs. Love and Randall, attorneys for the appellant (Mr. Sam Weiss, of counsel).

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Mr. John J. Degnan, Attorney General, attorney for the respondent (Mr. Donald S. Coburn, Acting Prosecutor of Essex County, of counsel; Mr. John S. Redden, Special Deputy Attorney General, on the brief).

PER CURIAM

Tried to a jury, defendant was convicted of kidnapping (N.J.S.A. 2A:118-1) and simple assault and battery (N.J.S.A. 2A:170-26). He was sentenced to a term of 30 to 31 years at State Prison on the kidnapping conviction and a concurrent 6 month term at the Essex County Correctional Center on the assault and battery conviction.

He appeals, asserting that: (1) the court erred in denying his motion for a new trial; (2) the court erred in not permitting defendant's alibi witnesses to

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testify; (3) it was prejudicial for the prosecutor to refer during cross-examination and summation to the possible violation of N.J. :19-19 by defendant, and (4) the mandatory minimum sentence for kidnapping is "over-punitive" and unfair.

All of the contentions are without merit. Defendant's request for a new trial was based on the recantation testimony of the victim Larry Moss and his brother Anthony. In denying the motion, the trial judge applied the standards found in State v. Pulchalski, 45 N.J. 97 (1965) and concluded that the recantation testimony was untrue. He considered not only the testimony of the two witnesses but all of the surrounding circumstances. He

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concluded that there was "no reasonable probability of the truth of the statements given by the witnesses on their recantation." The "ring of truth is totally absent in the recantation of both Larry Moss and Anthony Moss." Moreover, it has been held that the burden of proof rests upon those who are presenting such testimony "to establish that it is probably true and the trial testimony probably false." State v. Carter, 69 N.J. 420, 427 (1976) citing State v. Baldwin, 47 N.J. 379, 400 cert. den. 385 U.S. 980 (1966). The moving party did not sustain this burden, and the trial judge having applied the correct standards requires us not to interfere with his determination.

In asserting that the trial court

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erred in excluding one or more of defendant's proposed alibi witnesses, we note at the outset that only the exclusion of Jefferson Brown is pertinent. The other person, Willie Campbell, was withdrawn as an alibi witness.

R. 3:11-1 provides that if a defendant intends to rely in any way on an alibi, he shall upon demand:

> ***furnish a written bill of particulars, signed by him, stating the specific place or places at which he claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.***

R. 3:11-2 provides:

> If such bill of particulars is not furnished as required, the court may refuse to allow the party in default to present witnesses at trial as to defendant's absence from or

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> presence at the scene of the alleged offense, or make such other order or grant such adjournment as the interest of justice requires.

During pretrial discovery, defendant supplied the State with five alibi witnesses. There was no reference to the place or time any of the witnesses were in the company of defendant. The court refused to allow the defense to use Jefferson Brown as an alibi witness stating:

> I refuse to let you use the witness and I refuse to let you use the place where he was at. I won't let you call any witnesses by reason of your failure to supply the name, the location and address. Now you don't wait until the morning of the trial or the afternoon of the trial. You have known it since June. There is a letter in July, you sent names, never sent him where. I refuse to let you use the witness.

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In the circumstances of this case and considering the evidence licited on the cross-examination of Willie Campbell, we find the court's refusal to allow the witness to testify a sound exercise of his discretion. State v. Woodard, 102 N.J. Super. 419, 426-427 (App. Div. 1968), certif. den. 53 N.J. 64 (1968), cert. den. 395 U.S. 938 (1969). It is true we stated in State v. Francis, 128 N.J. Super. 346 (App. Div. 1974) that:

> ***the trial court should have done more to explore and to resolve the questions of whether the State would have been unfairly surprised or disarmed by defendant's testimony of alibi and if so whether that disadvantage might have been redressed by a reasonable continuance. *** [at 351].

However, we are satisfied that like Francis "[u]nder all of the circumstances

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and in the context of the strong evidence of defendant's guilt, defendant has failed to persuade us that the ruling on the part of the court below in limiting defendant's alibi testimony was a mistaken exercise of discretion or had any appreciable import on the jury's verdict." [at 352].

Furthermore, after reviewing the entire record, we are satisfied that there is no real possibility that the exclusion of this testimony led the jury to a result that they otherwise would not have reached. State v. Macon, 57 N.J. 325 (1971).

The references by the prosecutor during the cross-examination of the defendant as well as the summation concerning his alleged violation of

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N.J.S.A. 45:19-19 did not constitute plain error. Initially it should be pointed out that the jury was never told that a violation of this statute was a crime. Furthermore, the trial judge instructed the jury as follows:

> Now testimony has been heard concerning the defendant's alleged practice of carrying a badge identifying himself as a private detective, when out of uniform. You are not to consider this testimony in determining the defendant's guilt of this offense. If the State has failed to prove his guilt of this offense, you are to return a verdict of not guilty regardless of the manner in which the defendant may have carried a badge, whether it would be lawful or not it is not before you, for your consideration.

Any alleged prejudice was neutralized by the charge.

Finally, N.J.S.A. 2A:118-1 requires a

APPENDIX C

minimum 30 years term as a matter of law. State v. Hampton, 61 N.J. 250, 272-274 (1972). The Court in Hampton found the 30 years minimum sentence to be constitutionally valid. In this context, it is obvious that a sentence of 30 to 31 years cannot be considered unduly punitive or excessive. State v. Knight, 72 N.J. 193, 195 (1976).

Affirmed.

A TRUE COPY

Elizabeth McLauglin
Clerk

I hereby certify that the foregoing is a true copy of the original on file in my office.

Clerk

APPENDIX D

Order Denying Certification - Dated September 19, 1978

STATE OF NEW JERSEY v. MIMS HACKETT

September 19, 1978. Petition for certification denied.

APPENDIX E

IN THE MATTER OF THE DENIAL OF PRIVATE DETECTIVE LICENSE OF MIMS HACKETT, JR., PETITIONER-APPELLANT.

Superior Court of New Jersey
Appellate Division

Argued May 16, 1983 - Decided June 27, 1983.

Before Judges ARD, KING and McELROY.

Laura Bertollo argued the cause for appellant (Craig & Edelstein, attorneys).

Gregory C. Schultz, Deputy Attorney General, argued the cause for respondent, Division of State Police (Irwin I. Kimmelman, Attorney General of New Jersey, attorney).

The opinion of the court was delievered by

KING, J.A.D.

This case concerns the collateral civil consequences of a criminal conviction where a federal court has granted habeas corpus and the State has declined to retry defendant or to appeal

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the grant of the writ.

This is the background. On November 10, 1976 appellant Hackett was found guilty, after jury trial, of kidnapping, N.J.S.A. 2A:118-1, then a high misdemeanor, and simple assault and battery, N.J.S.A. 2A:170-26, a disorderly persons offense. Hackett was sentenced to the then-mandatory term of 30 to 31 years for kidnapping, N.J.S.A. 2A:118-1, and a concurrent six-month term for the simple assault.

Hackett appealed to this court which remanded to the trial division in June 1977 so that he could move for a new trial on the grounds of newly discovered evidence. He contended that two of the three identification witnesses for the state had

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recanted. The new trial motion failed; the judge found that the recantations lacked "the ring of truth." Thereafter, in June 1978 this court affirmed the convictions in an unpublished opinion and in September of that year our Supreme Court denied certification. 78 N.J. 332 (1978).

Hackett began serving his sentence and on October 19, 1978, while in custody, he filed a petition for a writ of habeas corpus in the United States District Court pursuant to 28 U.S.C.A. §2254. On February 22, 1979 Governor Byrne signed an order for commutation of Hackett's sentence, reducing it from 30 to 31 years to two to three years. He was released on parole on July 17, 1979.

On July 31, 1980 the District Court

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ordered that a writ of habeas corpus issue unless the State began retrial within 90 days. Hackett v. Mulcahy, 493 F. Supp. 1329, 1340 (D.N.J. 1980). The District Court judge found that Hackett had been deprived of his fundamental rights and due process of law because the trial judge had refused to allow him to call alibi witnesses. The trial judge had precluded the alibi witnesses because of noncompliance with the State's notice requirement, R. 3:11-1. The District Court judge stated that he "must address an issue which the Supreme Court has twice declined to decide - whether a notice of alibi statute may be enforced by the exclusion of potentially exculpatory evidence." Id. at 1330-1331 (footnote

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omitted). The District Court judge considered the defect in the notice of alibi witnesses furnished to the State before Hackett's trial as highly technical in nature, saying

> The trial court's refusal to permit the introduction of evidence crucial to petitioner's case visited a terrible punishment on a party innocent of even the minor transgression of the rules revealed by this record. He was deprived of the right to defend himself. The prosecutor's conduct in using the defense which the jury was not permitted to hear to undermine the credibility of the defense which they did hear was grossly unfair. In view of the highly technical nature of his counsel's error, the absence of any evidence of complicity by petitioner in that error the lack of any prejudice to the State caused by the error, the severe prejudice to petitioner caused by the preclusion sanction, and the use of that sanction by the prosecution

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> before the jury, we find that this defendant was deprived of fundamental rights and of due process of law. [Id. at 1340.]

The State filed a notice of appeal to the Third Circuit Court of Appelas from the grant of habeas corpus. The notice of appeal was later withdrawn and the appeal was dismissed on September 22, 1980. The Essex County prosecutor's office then informed Hackett that they did not intend to retry him.

In late 1981 Hackett applied for a private detective's license, a profession regulated by the Private Detective Act of 1939. N.J.S.A. 45:19-8 et seq. The license application was denied by the Division of State Police because his conviction for kidnapping created a regulatory disqualification for licensure,

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N.J.S.A. 45:19-12 (good character, competency and integrity required for license); N.J.A.C. 13:55-1.11(a)(1) (conviction of a high misdemeanor automatic regulatory ban). The regulation compels mandatory disqualification for high misdemeanants if they have "not subsequent to such conviction received executive pardon therefor removing any civil disabilities incurred thereby." N.J.A.C. 13:55-1.11(a)(1). The Private Detective Act itself contains no specific mandatory disqualification for high misdemeanants.

Hackett then requested an administrative hearing which was held by the Office of Administrative Law. The administrative law judge concluded that

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Hackett's license denial, solely on the ground that his disqualifying conviction for a high misdemeanor was still of record, was appropriate. He gave five reasons for agreeing with the Division of State Police: (1) Hackett's conviction had been affirmed by this court and certification had been denied, (2) the constitutional deprivation was based on an issue never squarely decided by the United States Supreme Court, (3) the refusal of the prosecutor to appeal the grant of the writ or retry the petitioner was not a "concession that the writ was properly issued," (4) no pardon had been granted, and (5) the public interest in strict regulation of private detectives. The Superintendent of State Police adopted the

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decision of the administrative law judge as his final decision and denied the license. N.J.S.A. 52:14B-10(d).

The traditional power of the federal courts in issuing a writ of habeas corpus has been limited to release of the prisoner. For an interesting recent analysis of the operation of the Federal habeas system see Allen, Schachtman and Wilson, Federal Habeas Corpus and its Reform: An Empirical Analysis, 13 Rutgers L.J. 675 (1982). In Fay v. Noia, 372 U.S. 391, 430-431, 83 S.Ct. 822, 844-845, 9 L.Ed.2d 837 (1963), the Supreme Court said that "[h]abeas lies to enforce the right of personal liberty; when that right is denied and a person is confined, the federal court has the power to release him.

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Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner."

However, in Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968), the Supreme Court ruled that a person bringing a habeas corpus petition under 28 U.S.C.A. §§2241-2254 did not have to be in actual custody at the time the writ was decided. Prior to Carafas if a petitioner was released from custody before the decision on the merits, his petition was mooted. Parker v. Ellis, 362 U.S. 574, 80 S.Ct. 909, 4 L.Ed.2d 963 (1960). In overruling Parker, the Carafas Court explained why the petition was not moot.

It is clear that

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petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these "disabilities or burdens [which] may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." Fiswick v. United States, 329 U.S. 211, 222, 67 S.Ct. 224 [230], 91 L.Ed. 196, 203 (1946). On account of these "collateral consequences," the case is not moot. Ginsberg v. New York, 390 U.S. 629, 633-634, n. 2, 88 S.Ct. 1274 [1276-1277 n. 2], 20 L.Ed.2d 195, 200 (1968); Fiswick v. United States, supra, at 222, n. 10 [, 67 S.Ct. at 230 n. 10], 91 L.Ed. at 203; United States v. Morgan, 346 U.S. 502, 512-513, 74 S.Ct. 247 [253-254], 98 L.Ed. 248, 257-258 (1954).

* * * *

In the present case,

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> petitioner filed his application shortly after June 20, 1963, while he was in custody. He was not released from custody until March 6, 1967, two weeks before he filed his petition for certiorari here. During the intervening period his application was under consideration in various courts. Petitioner is entitled to consideration of his application for relief on its merits. He is suffering, and will continue to suffer, serious disabilities because of the law's complexities and not because of his fault, if his claim that he has been illegally convicted is meritorious. There is no need in the statute, the Constitution, or sound jurisprudence for denying to petitioner his ultimate day in court. [391 U.S. at 237-239, 88 S.Ct. at 1559-1560.]

Thus, at least for mootness purposes Carafas recognized that the impact of collateral consequences of state court convictions was sufficiently compelling reason for exercising federal habeas

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jurisdiction even after discharge from physical custody.

Indeed, our research discloses that the discussion of collateral consequences of state court convictions almost invariably arises within the mootness context. See, e.g., Matthews v. Florida, 463 F.2d 679, 681 (5 Cir. 1972); Brown v. Resor, 407 F.2d 281 (5 Cir. 1969), cert. den. 399 U.S. 933, 90 S.Ct. 2249, 26 L.Ed.2d 806 (1970); Nix v. State, 233 Ga. 73, 209 S.E.2d 597, 598 (Sup. Ct. 1974), aff'd 236 Ga. 110, 223 S.E.2d 81 (Sup. Ct. 1976); Duran v. Morris, 635 P.2d 43, 45-46 (Utah Sup. Ct. 1981). We have found no case quite like the instant one, where a successful habeas petitioner, not subjected to retrial, has challenged an

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attempt by a state to use an unconstitutionally obtained conviction as a bar to a privilege of citizenship like licensing, voting, or for disqualification from office or employment.

The Supreme Court of Georgia is the one authority that has spoken, at least theoretically, on the precise issue. In Cooper v. State, 245 Ga. 60, 262 S.E.2d 816 (1980), petitioner appealed from a partially favorable judgment in a state habeas proceeding. Petitioner had been convicted of a series of burglary charges upon uncounselled pleas of guilty. Though he had served his sentence he alleged "that he continue[d] to sustain adverse collateral consequences as a result of said convictions and that said adverse

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collateral consequences will continue to handicap and plague him in the future if they are not removed..." 262 S.E.2d at 817. His constitutional claims were based on both denial of counsel and the systematic exclusion of blacks from the grand jury in the county where the indictments were returned. The trial judge granted habeas relief declaring the convictions "constitutionally invalid." Ibid. The judge entered an order which "declared [the convictions] null and void as to any present day collateral consequences and only to that extent." Ibid. Petitioner objected to this language in the order and appealed, contending that the order was too limited in effect. The Supreme Court of Georgia agreed and reversed, saying

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> We agree with the contentions of the appellant. It is hornbook law that a void judgment is a nullity, void ab initio. The trial court, after a hearing, agreed with petitioner's contentions that he failed to have the benefit and assistance of counsel to which he was entitled and that there was a systematic exclusion of black persons from the grand jury which indicted him.
>
> The trial court then concluded that the convictions were "null and void." The trial court could not thereafter breathe life into that order by limiting its collateral consequences to the present and future and not to the past.
>
> Judgment reversed with direction that the limiting language be stricken from the judgment. [Id. at 817.]

The relief which Hackett seeks on this appeal seems to be precisely the relief the petitioner sought and obtained from the Georgia Supreme Court in Cooper v. State, namely, an adjudication that a

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conviction obtained in violation of a federal constitutional right cannot fairly be used by the State to diminish his rights as a citizen. This relief, as noted in Fay v. Noia, supra, 372 U.S. at431, 83 S.Ct. at 844, is unavailable in a federal court on habeas which "cannot revise the state court judgment; it can act only on the body of the petitioner." The question before us is whether that relief should be available in this state proceeding.

[1] The Attorney General contends that Smith v. Spina, 477 F.2d 1140 (3 Cir. 1973), is persuasive authority against Hackett's claim on this appeal. In Spina the defendant in a federal criminal trial was impeached through the introduction of a prior state conviction. Following this

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federal criminal trial, a writ of habeas corpus was granted by the federal courts on the ground of improper jury selection with respect to the prior state conviction used for impeachment. The Spina court ruled that admission of the state criminal conviction to impeach defendant's credibility before the writ had been granted was not reversible error stating: "It does not have the force and effect of voiding a conviction. Moreover, at the time the evidence was introduced at trial, no court had granted the writ of habeas corpus." Id. at 1147. The Third Circuit also observed that the federal courts followed the general rule "that it is permissible to attack the credibility of a witness by showing a previous criminal

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conviction even though an appeal therefrom or a motion for new trial is pending." Id. at 1148. See Fed. R. Evid. 609(e). We think the Spina decision's rationale was based primarily on the use of the impeaching conviction before the writ had issued. Moreover, New Jersey does not permit use of a prior conviction still under attack on appeal to be used for impeachment. This court in State v. Blue, 129 N.J. Super. 8, 12 (App. Div.), certif. den. 66 N.J. 328 (1974), stated "we find it to be fundamentally unfair to permit the use of a prior conviction to impeach credibility while the very credibility of this conviction itself is under attack through the appellate process." We consider it equally likely, if faced with

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the issue, that this court would hold that use of conviction, which had been successfully attacked on an application for post-conviction relief, to attack credibility would be just as "fundamentally unfair."

Interestingly, other federal authorities have used language which affirms the view that issuance of a writ of habeas corpus has consequences beyond simply releasing the prisoner, notwithstanding the narrow view of the writ expressed in Foy v. Noia, supra, and Smith v. Spina, supra. In Rimmer v. Fayetteville Police Dep't., 567 F.2d 273, 276-277 (4 Cir. 1977), the Court of Appeals said:

When, after exhaustion of

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> state court remedies, a prisoner succeeds in an action under § 2254, he is the ultimate victor. While the state court judgment is neither reversed nor vacated, the prisoner is released and the state court judgment authoritatively declared void. Thereafter, the state court judgment should have no preclusive effect.

In United States ex rel. Hickey v. Jeffes, 571 F.2d 762 (3 Cir. 1978), petitioner was serving a general sentence of five-to-ten years for convictions of theft, involuntary deviate sexual intercourse, carrying a firearm without a license, and committing a crime of violence while armed with a firearm. The court held that his due process rights were violated when the State was not required to present affirmative proof of absence of a license in order to convict for carrying a

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firearm without a license. The court rejected petitioner's attempts to set aside his other convictions. The court could not modify the sentence, but remanded so that the district court could relieve petitioner of any collateral consequences.

> But under Pennsylvania Law a general sentence will be upheld if there is any valid count sustaining it, despite the invalidity of one or more of the other underlying counts, so long as the sentence is, as here, within the prescribed statutory maximum for the valid conviction. Thus it may be that even if the unlicensed possession conviction is invalid, the Pennsylvania courts would not disturb the sentence. But it does not follow that habeas corpus relief is unavailable. Certainly we must presume, as did the Court in Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), Sibron v. New York,

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392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), and Pollard v. United States, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957), that there are present and future collateral consequences, in addition to present custody, flowing from the invalid conviction. And while some form of custody may be deemed to be jurisdictional for federal habeas corpus, "the statute does not deny the federal courts power to fashion appropriate relief other than immediate release." Peyton v. Rowe, 391 U.S. 54, 66, 88 S.Ct. 1549, 1556, 20 L.Ed.2d 426 (1968). As early as Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941), the Court held that a conviction could be challenged in a habeas corpus proceeding even though petitioner would not be released if he prevailed. 28 U.S.C. §2244(b) provides for "release from custody or other remedy." See Carafas v. LaVallee, 391 U.S. 234, 239, 88 S.Ct. 1556 [1560], 20 L.Ed.2d 554 (1968); Walker v. Wainwright, 390 U.S. 335, 336, 88 S.Ct. 962 [963], 19 L.Ed.2d 1215 (1968); Jones v. Cunningham, 371 U.S. 236, 243,

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> 83 S.Ct. 373 [377], 9 L.Ed.2d 285 (1963). The district court has the statutory authority to relieve Hickey from the collateral consequences, whatever they may be, of an unconstitutional conviction even though it would not disturb the general sentence which is sustainable on other counts. [Id. at 764-765.]

Considering that the other convictions remained, probably the only possible collateral remedy was to have one less conviction on the record.

The specific power of ordering expungement of records was discussed in Mizell v. Attorney General of N.Y., 586 F.2d 942 (2 Cir. 1978), cert. den. 440 U.S. 967, 99 S.Ct. 1519, 59 L.Ed.2d 783 (1979). In Mizell the federal district court had issued a writ of habeas corpus because double jeopardy attached when the jury was

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sworn in petitioner's first trial. The circuit court agreed with the decision on these grounds, but vacated and remanded the petition so that the petitioner could apply for appropriate relief.

> Mizell may wish to ask for such other relief. The conviction of September 10, 1971, may subject him to "disabilities or burdens" (Fiswick v. United States, 329 U.S. 211, 222, 67 S.Ct. 224 [230], 91 L.Ed. 196 (1946)) and to "collateral consequences" (Ginsberg v. New York, 390 U.S. 629, 633-34 n. 2, 88 S.Ct. 1274 [1276-77 n. 2], 20 L.Ed.2d 195 (1968)). The judgment below must be vacated so that Mizell may apply for such other relief. We leave it to the district court to determine what relief should be granted. We note the possibility of a declaration that the September 10, 1971 conviction is void and of an order to the respondent Attorney General to apply in the New York courts for a vacatur of the conviction and for an order

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> expunging it and all references to it from the records. There are few precedents. The problem seems to have arisen in the following cases: North Carolina v. Rice, 404 U.S. 244, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971), vacating and remanding Wood v. Ross, 434 F.2d 297 (4th Cir. 1970); Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976); Grandison v. Warden, 423 F. Supp. 112 (D.Md. 1976); Bentley v. Florida, 285 F. Supp. 494 (S.D. Fla. 1968). See also Sokol, [Federal Habeas Corpus] 78-80 [(2d ed. 1969)]. [Id. at 948.]

The precedents cited in Mizell add little explanation. In North Carolina v. Rice, supra, 404 U.S. at 248, 92 S.Ct. at 405, the court explained that use of a habeas corpus petition to challenge an invalid sentence (instead of an invalid conviction) would generally be mooted if the petitioner had served the sentence

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because collateral consequences flow from the conviction and not the sentence. The court remanded for a determination if there were collateral consequences that follow specifically from an invalid sentence when the conviction is valid under North Carolina law. The language of the case does indicate that if the conviction is nullified, petitioner should be freed from the collateral consequences of the conviction. Id. at 247-248, 92 S.Ct. at 404-405.

In Grandison v. Warden, Maryland House of Correction, 423 F. Supp. 112 (D. Md. 1976), the district court had pursuant to granting a habeas corpus petition entered an order which vacated petitioner's convictions, declared them

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null and void, and ordered the convictions expunged from the record. Petitioner subsequently returned to district court to enforce that order. The court held "that it has the authority to order the expungement of petitioner's records against all persons who maintain custody of such records." Id. at 116.

In Bentley v. Florida, 285 F. Supp. 494 (S.D. Fla. 1968), the court granted the writ when petitioner had entered a guilty plea after a brief interview with his attorney. The court granted the following relief:

> It is the conclusion of the Court that petitioner was denied the effective assistance of counsel prior to his plea and sentencing in this case. Upon such finding it is the duty of this Court to dispose of the

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> case as law and justice require. 28 U.S.C. §2243. Because petitioner has completed his sentence and been released from custody, it would be manifestly unjust to order a new trial. But it would be equally inequitable to require him to remain branded as a felon for a crime of which he was not lawfully convicted. Thereupon it is
>
> Ordered and adjudged that the Order of this Court dated April 26, 1968 be and the same is hereby vacated, and it is further
>
> Ordered and adjudged that the conviction of petitioner be and the same is hereby vacated and set at naught. [Id. at 498].

Pinnell v. Cauthron, 540 F.2d 938, 939 (8 Cir. 1976), simply applied the rule in Carafas without discussing the power to relieve petitioner from collateral consequences.

Only one New Jersey precedent is significant. In State v. Perwin, 67 N.J.

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594 (1975), defendant had been convicted of defrauding an insurance company by faking automobile accidents. His sentence included $4,000 in fines on a four-count indictment. After unsuccessful State and federal appeals he prevailed in a federal habeas proceeding on double jeopardy grounds as to one of the four counts, the conspiracy count, of the indictment. Since retrial on the remaining three counts - false pretenses - was permissible and not barred by double jeopardy, "[t]he District Court directed that execution of the writ be stayed for 45 days to enable the County Prosecutor to appeal the order, retry the defendant on the three counts of false pretenses, or do both. The Prosecutor chose to drop the matter." Id.

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at 597.

Perwin then sought to force the return of the $4,000 fine under N.J.S.A. 2A:166-13, which reads in pertinent part to the effect that when a defendant has paid a fine and "has taken an appeal and obtained a decision in his favor terminating the case of the state against him," the board of freeholders shall return the fine to him. Our Supreme Court agreed with Perwin and ordered the $4,000 fine returned to him. Our court noted the high court's reasoning in Carafas v. LaVallee, supra, that "the case was not rendered moot when the defendant was released since the consequences of the conviction resulted in many disabilities, such as inability to vote or serve as a

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juror." 67 N.J. at 599. Our court equated Perwin's successful habeas petition as the equivalent of a "decision in his favor terminating the case of the state against him" within the meaning of N.J.S.A. 2A:166-13, where the prosecutor refused to appeal or retry the case. To this extent, at least, our Supreme Court has articulated a collateral impact to the issuance of federal habeas beyond simply releasing the prisoner and has analogized it to a successful appeal.

[2] While the regulation confronting us controlling the right to a private detective's license does not specifically speak to reversal of convictions on appeal, but only to executive pardon, as an exception, N.J.A.C. 13:55-1.11, our

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Supreme court's approach to Perwin convinces us that the only fair path here is to treat appellant Hackett's kidnapping conviction as if it had been overturned on appeal and is therefore void as to all collateral civil disabilities.[1] We are convinced that under State v. Blue, supra, as discussed above, Hackett's conviction could not be used for impeachment purposes under N.J.S.A. 2A:81-12. Our decision here is also motivated in part by the realization that the reason for the grant of the writ by the District Court was the fundamental deficiency in the reliability

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[1] The kidnapping conviction could not be expunged. N.J.S.A. 2C:52-2(b); State v. T.P.M., 189 N.J. Super. 360 (App. Div. 1983).

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of the fact-finding process at Hackett's kidnapping trial. He was precluded, in effect, from presenting his side of the story, his defense. Therefore, the reliability of the facts supporting the conviction is inherently suspect in contrast to an illegal search and seizure situation where the tainted evidence is itself inherently reliable and in another context may well be admissible, e.g., a civil proceeding. See United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976). Moreover, the record before us also discloses that appellant Hackett has been restored, with retroactive reinstatement of all tenure and pension rights, to his position as a school teacher employed by the Union City

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Board of Education. He had held that position from 1963 until his conviction in 1976. In an order signed on October 2, 1981 the Commissioner of Education announced his concurrence with the settlement agreement between Hackett and the Board, thus permitting Hackett's return to teaching with all retroactive benefits. We would create an insensitive irony if we held that Hackett, deemed fit to teach children in the public schools, could not even receive the consideration of a fair investigation and evaluation in his quest for a private detective's license.

[3] We fully realize that the strict regulation of the private detective profession is an important and sensitive

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task imposed on the State Police. See Schulman v. Kelly, 54 N.J. 364, 371 (1969); In re Berardi, 23 N.J. 485, 494-495 (1957). But we do not conceive our holding here as inimical to the public interest in any sense. The Superintendent of State Police is only precluded from exercising a per se license disqualification where an unchallenged grant of habeas corpus has effectively nullified a State criminal conviction. On remand and reconsideration of Hackett's application the Superintendent is free to fully examine Hackett's background in determining if he meets the statutory and regulatory criteria for licensing. N.J.S.A. 45:19-12 (good character, competency and

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integrity); N.J.A.C. 13:55-1.11[2] (regulatory grounds for denial of a license).

The matter is reversed and remanded to the Division of State Police for reconsideration of appellant's application for a private detective's license as if the record of the kidnapping conviction did not exist.

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2 N.J.A.C. 13:55-1.11 ("Ground for denial, revocation, suspension or refusal to renew a license") reads as follows:

(a) The Superintendent may deny, revoke, suspend or refuse to renew a license upon determining that the applicant or licensee has:

1. Been convicted of a high misdemeanor or any of the misdemeanors or offenses prescribed by N.J.S.A. 45:19-16 and who has not subsequent to such conviction received executive pardon therefor removing any civil disabilities incurred thereby;

(Cont'd)

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(Footnote continued from previous page)

2. A bad moral character, intemperate habits or a bad reputation for truth, honesty and integrity;

3. Knowingly made a false material statement in his application;

4. Been convicted of a violation of the New Jersey Wiretapping and Electronic Surveillance Control Act (N.J.S.A. 2A:156A-1 et seq.);

5. Practiced fraud, deceit or misrepresentation, including but not limited to:

i. Knowingly making a false statement or written report relating to evidence or information obtained in the course of employment;

ii. Manufacturing evidence;

iii. Accepting employment adverse to a client or former client relating to a matter with respect to which the licensee has obtained confidential information by reason of or in the course of his employment by such client or former client;

6. Demonstrated incompetence or untrustworthiness in his actions;

7. Failed to maintain a proper surety bond as required by N.J.S.A. 45:19-12; or

8. Failed to meet or continue to

(Cont'd)

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(Footnote continued from previous page)

meet the requirements for licensure provided by the act and these rules.

(b) The Superintendent may, upon written notice, suspend or revoke any license pursuant to N.J.S.A. 45:19-13, pending any hearing provided for by law or these rules.

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Order Granting Permits - Filed April 23, 1985

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ESSEX COUNTY

APPLICATION OF
MIMS HACKETT, JR.

ORDER GRANTING APPLICATION FOR A FIREARMS PURCHASER IDENTIFICATION CARD, GRANTING APPLICATION FOR A PERMIT TO PURCHASE A HANDGUN AND GRANTING APPLICATION TO CARRY A HANDGUN

The application of appellant for a firearms purchaser identification card, a permit to purchase a handgun and a permit to carry a handgun, having been previously denied by the Chief of Police of Orange, New Jersey, and the Appellant having requested a hearing pursuant to N.J.S.A. 2C:58-3(a) and (b), and N.J.S.A. 2C:58-4, and the Court having filed a written opinion herein;

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IT IS ON thia (sic) 23rd day of April, 1985;

ORDERED that the appellant's application for a firearms purchaser identification card, a permit to purchase a handgun and a permit to carry a handgun, be and the same are hereby granted.

HON. CHARLES E. VILLANUEVA
CHARLES E. VILLANUEVA, J.S.C.

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Opinion Granting Permits - Dated April 23, 1985

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTED ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION ESSEX COUNTY

IN THE MATTER OF THE APPLICATIONS OF MIMS HACKETT, JR., FOR PERMITS TO PURCHASE HANDGUN AND CARRY HANDGUN AND A FIREARMS PURCHASER IDENTIFICATION CARD.

Civil Action

Docket No.

OPINION

Decided: April 23, 1985

Laura Bertollo for Appellant
(Stephen J. Edelstein, attorney)

Kenneth Ply, Assistant Prosecutor, for respondent, State of New Jersey
(George L. Schneider, Essex County Prosecutor, attorney)

VILLANUEVA, J.S.C.

This is an appeal of the denial by a chief of police of applications for a

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permit to purchase a handgun, a firearms purchaser identification card and a permit to carry a handgun.

The legal issue is whether a state court conviction is effectively nullified by the issuance of a federal writ of habeas corpus, thereby constituting no disability to that person to obtain firearms permits despite the fact that N.J.S.A. 2C:58-3c(1) provides that no such permits shall be issued to any person who has been convicted of a crime.

The factual issue is whether the applicant showed a justifiable need to carry a handgun.

The court concludes that the state court conviction was effectively nullified by the federal court ruling on applicant's

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habeas corpus petition, and, therefore, it does not disqualify him from obtaining firearms permits. The applicant also proved a justifiable need to carry a handgun.

NATURE OF THE CASE

This case concerns the collateral civil consequences, in firearms applications, of a criminal conviction where a federal court has granted habeas corpus and the State declined to retry defendant or to appeal the grant of the writ.

FINDINGS OF FACT

Mims Hackett, Jr., was indicted by an Essex County Grand Jury on May 4, 1976,

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charged with the crimes of atrocious assault and battery, kidnapping, and threatening to take the life of another.

He was found guilty of simple assault and battery (a disorderly persons offense) and kidnapping (then a high misdemeanor); he was sentenced to the then-mandatory custodial term of 30 to 31 years for kidnapping and to a concurrent sentence of six months for the assault. He appealed to the Appellate Division of Superior Court, which affirmed his conviction. When the New Jersey Supreme Court denied his petition for certification, Hacket began serving his sentence.

On October 19, 1978, he filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C.A. §2254, in the

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United States District Court for the District of New Jersey.

On February 22, 1979, Governor Byrne signed an order for commutation of Hackett's sentence, reducing it from 30 to 31 years to 2 to 3 years. He was released on parole on July 17, 1979.

By opinion and order filed July 31, 1980, the United States District Court judge ordered the State to commence retrial proceedings against Hackett within 90 days and further ordered that unless such proceedings were commenced, a writ of habeas corpus would issue. Hackett v. Mulcahy, 493 F. Supp. 1329 (D.N.J. 1980). The State filed a notice of appeal to the Third Circuit Court of Appeals from the grant of habeas corpus. The notice of

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appeal was later withdrawn and the appeal was dismissed on September 22, 1980. The Essex County prosecutor's office then informed Hackett that they did not intend to retry him.

Beginning in 1968, Hackett was involved in investigation and security work as well as acting as a bodyguard. He was licensed by the State Police as a private detective agency at that time and was issued a permit to carry a handgun by a Superior Court judge in 1969 for such work. His permit was renewed annually until 1975, except for 1970 when his application for a carry permit was denied. When Hackett was charged with kidnapping in 1976, he did not seek any renewal of his permit to carry a handgun until he made the

APPENDIX G

present application, nor did he seek to renew his private detective's license until 1981.

In 1981, Hackett again applied for a private detective's license. The Division of State Police initially denied the application on the basis that Hackett's state conviction created a regulatory disqualification for licensure. Hackett requested a hearing on the denial of the license and the matter was referred to the Office of Administrative Law. The administrative law judge concluded that the license denial was appropriate, his decision was adopted by the Superintendent of State Police as his final decision, and the license was denied. Hackett appealed and the Appellate Division reversed this

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decision and remanded the matter to the Division of State Police for reconsideration of Hackett's application for a private detective's license as if the record of the kidnapping conviction did not exist. Matter of Hackett, 190 N.J. Super. 300, 313 (App. Div. 1983).

On February 15, 1984, the State Police issued Hackett a private detective's license.

On July 24, 1984, Hackett applied to the Chief of Police of Orange to obtain a permit to purchase a handgun pursuant to N.J.S.A. 2C:58-3a, a firearms purchaser identification card pursuant to N.J.S.A. 2C:58-3b, and a permit to carry a handgun pursuant to N.J.S.A. 2C:58-4. Hackett stated in his application that he had never

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been convicted of a crime which had not been expunged. However, a record check still showed the kidnapping conviction. The police chief denied the applications because of this falsification and the purported per se disqualification, N.J.S.A. 2C:58-3c(1), because the criminal conviction was still of record. The police chief also determined that Hackett failed to show a justifiable need so he also denied the applicaiton for a carry permit. Siccardi v. State, 59 N.J. 545 (1971).

Hackett was employed as a member of the teaching staff of the Union City Board of Education during November 1963, earned tenure in December 1966, and thereafter continued his tenured employment. However, on February 22, 1978, an order was

APPENDIX G

issued by the New Jersey Commissioner of Education, which terminated him from his teaching position and declared his tenure rights forfeited (because of the kidnapping conviction). Hackett filed a petition requesting the Commissioner of Education to reconsider this controversy. The parties subsequently entered into a settlement that restored Hackett, with retroactive reinstatement of all tenure and pension rights, to his position as a school teacher.

Hackett is still a full-time school teacher in Union City. He also acts as a licensed private detective, trading as "Protective Investigator, Inc.", performing body guard or escort service, security and investigative services.

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Hackett testified that he performs investigative services, and that he believes as a result of same that he received telephone threats on his life. He also testified that he wants to perform security guard services and has submitted proposals to Irvington General Hospital, Orange Housing Authority and Ewing Bonding Agency. His past work for bonding companies and work that he seeks to continue to perform is aiding in the apprehension of defendants who are wanted on bench warrants, requiring him to go into dangerous areas late at night to assist in their apprehension.

Hackett stated that he also provides unarmed escort service for celebrities arriving at, or leaving from, Newark

APPENDIX G

Airport and wants a carry permit to perform this security service. Therefore, the court notified the Newark Chief of Police of this fact. The court was orally informed by said chief that he had no objection to such armed security service.

APPLICABLE STATUTES

No handgun purchase permit or firearms purchaser identification card shall be issued to any person who has been convicted of a crime...N.J.S.A. 2C:58-3c(1).

The court shall issue the permit (to carry a handgun) to the applicant if, but only if, it is satisfied that the applicant is a person of good character who is not subject to any of the disabilities set forth in section 2C:58-3c., that he is thoroughly familiar with the safe handling and use of handguns, and that he has a justifiable need to carry a handgun.
N.J.S.A. 2C:58-4d.

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STATE'S OBJECTIONS

The State contends that despite the issuance of a writ of habeas corpus by the United States District Court in Hackett v. Mulcahy, supra, the conviction stands as a per se disqualification for conviction of crime, N.J.S.A. 2C:58-3c(1), because the habeas did not reverse or vacate Hacket's kidnapping conviction.

Hackett never received a pardon nor was his conviction ever reversed by a New Jersey court. His conviction was not expunged; in fact, a kidnapping conviction is not subject to expungement. N.J.S.A. 2C:52-2(b). In denying the application, the police chief found that Hackett knowingly falsified information, a disqualification under N.J.S.A. 2C:58-

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3c(3), by stating that he had never been convicted of a crime that had not been expunged or sealed.

The State further contends that a state court conviction resting on constitutional error is not necessarily void for all purposes, Fay v. Noia, 372 U.S. 391, 424, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), and that the opinion of the Appellate Division in Matter of Hackett, supra, was dictum and does not preclude this court from examining the issue of the effect of the writ of habeas corpus on Hackett's present applications for firearms permits.

The State also contends that Hackett failed to show a justifiable need required to obtain a permit to carry a handgun.

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Siccardi v. State, supra. N.J.S.A. 2C:58-4d.

EFFECT ON FIREARMS APPLICANT OF WRIT OF HABEAS CORPUS AFTER HIS STATE COURT CONVICTION

Historically, the purpose of the writ of habeas corpus was to test the legality of a prisoner's current detention. For a classic discussion of the origin and history of the writ of habeas corpus, see Fay v. Noia, supra. Originally, the sole relief which could be granted by the issuance of the writ was the prisoner's release from an illegal confinement. Fain v. Duff, 488 F.2d 218 (5th Cir. 1973), cert. den. 421 U.S. 999; 95 S.Ct. 2396, 44 L.Ed.2d 666 (1975). Zaffarano v. Fitzpatrick, 404 F.2d 474 (2d Cir. 1968), cert. den. 395 U.S. 977, 89 S.Ct. 2130, 23

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L.Ed.2d 766 (1969). In 1966, the Federal Habeas Corpus Statute, 28 U.S.C.A. §2254, was amended to provide for remedies in addition to release from physical custody. It was formerly a prerequisite for habeas relief that the applicant be in custody or confinement. This is no longer a requirement, and habeas relief is available even to individuals who have been unconditionally released from custody. Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968).

Prior to Carafas, if a petitioner were released from custody before the decision on the merits, his petition was mooted. Parker v. Ellis, 362 U.S. 574, 80 S.Ct. 909, 4 L.Ed.2d 963 (1960).

Thus, at least for mootness purposes,

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Carafas recognized that the impact of collateral consequences of state court convictions was a sufficiently compelling reason for exercising federal habeas jurisdiction even after discharge from physical custody.

The rationale for both the relaxation of the detention standard and the expansion of remedies available to a successful habeas petitioner was the recognition that many individual rights are affected by a criminal conviction.

Several courts have held that if the writ issues, the state court conviction is thereby rendered null and void. Rimmer v. Fayetteville Police Dept., 567 F.2d 273 (4th Cir. 1977); Miller v. Crouse, 346 F.2d 301 (10th Cir. 1965).

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The extinguishment of the collateral civil consequences of a conviction by virtue of the issuance of writ of habeas is a principle recognized by our courts. Prior to the decision in Matter of Hackett, supra, the only relevant New Jersey case was State v. Perwin, 67 N.J. 594 (1975). Perwin was convicted in the state court proceeding of conspiracy to obtain money under false pretenses and was sentenced to a prison term and fined. After exhausting all state avenues of appeal, a petition for a writ of habeas corpus was filed in the U.S. District Court and granted. After the issuance of the writ, Perwin moved in state court for the return of his fine. The Surpreme Court ordered the fine returned to Perwin, as it concluded that the

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issuance of the writ terminated the case in Perwin's favor, a prerequisite under the fine remission statute.

Hackett cannot be disqualified on the basis of his kidnapping conviction where the Appellate Division has already ruled that his unchallenged grant of habeas corpus effectively nullified same. Matter of Hackett, supra at 312.

A pardon removes both the punishment and the disabilities consequent upon the conviction, including the disability to receive a permit to carry a firearm. Although the pardon eliminates the consequences of a conviction, it does not blot out the fact of the conviction, and that the conviction is prima facie but rebuttable evidence of lack of good and

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moral character. Application of S.S., 130 N.J. Super. 21 (Essex Cty. Ct. 1974).

In this case, we are not faced with a pardon, but with the issuance of a writ of habeas corpus. Obviously, they differ in several respects. A pardon does not test guilt or innocence but is an exercise of sovereign or executive clemency toward the guilty. Evidence of a pardoned conviction may be used to impugn the credibility of a witness who has been pardoned, whereas evidence of a conviction for which a writ of habeas corpus was issued may not be so used. Matter of Hackett, supra at 307.

Our Supreme Court has articulated that there is a collateral impact to the issuance of federal habeas and has analogized it to a successful appeal.

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State v. Perwin, supra, at 599. The key to the remedy is the favorable final conclusion.

With regard to habeas relief, the Appellate Division ruled that the grant of same to Hackett effectively nullified his criminal conviction. The court further stated that his application for a private detective's license should be considered as if the record for kidnapping did not exist. The court did not hold that the conviction could be evidence, even rebuttable, of his lack of "good character, competency and integrity." The Appellate Division suggested that evidence of a conviction, subject to unchallenged habeas relief, could not impugn the credibility of a witness, unlike evidence

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of a pardoned conviction.

Therefore, Hackett's kidnapping conviction is not a disqualification under N.J.S.A. 2C:58-3c(1) nor is it any evidence of lack of good and moral character.

Hackett did not "knowingly falsify" his application when he answered the question about criminal convictions as if there were none.

The actual setting aside of a state court conviction is unavailable in a federal court on habeas which "cannot revise the state court judgment; it can act only on the body of the petitioner." Fay v. Noia, supra. This is so because a habeas corpus proceeding directed at a judgment of conviction is a collateral

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attack on such judgment. State v. Cynkowski, 19 N.J. Super. 243, 250 (App. Div. 1952), aff'd 10 N.J. 571 (1952).

It would be fundamentally unfair to use this conviction, which had been successfully attacked on an application for post-conviction relief, as a disqualification for a firearms application. State v. Blue, 129 N.J. Super. 8, 12 (App. Div. 1974), certif. den. 66 N.J. 328 (1974); Matter of Hackett, supra at 307.

The only fair way to treat Hackett's kidnapping conviction is as if it had been overturned on appeal and is therefore void as to all collateral civil disabilities.

A conviction obtained in violation of a federal constitutional right cannot

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fairly be used by the State to diminish the rights of a citizen.

Hackett has no disability under N.J.S.A. 2C:58-3c(1) which could deny him a permit to purchase a handgun or a firearms purchaser identification card.

APPLICANT HAS SHOWN JUSTIFIABLE NEED TO OBTAIN PERMT TO CARRY A HANDGUN.

Hackett has been licensed by the State Police to act as a private detective. He has shown proficiency in handling firearms. He acts as a body guard or escort for promoters and entertainers. He does private investigations that, he believes, have caused threats to his life. He also performs security services. He also works as a bounty hunter to return escaped felons to the court's

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jurisdiction.

The court routinely issues carry permits to employees of private detective agencies to perform security work. There has been no evidence whatsoever produced that would justify this court in determining that Hackett's need to carry a handgun is any different from that of any other private detective performing security work.

Hackett has satisfied the court that he is a person of good character who is not subject to any of the disabilities set forth in N.J.S.A. 2C:58-3c, that he is thoroughly familiar with the safe handling and use of handguns, and that he has a justifiable need to carry a handgun. Siccardi v. State, supra. N.J.S.A. 2C:58-

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4d.

Therefore, all permits are hereby granted.

APPENDIX H

State's Notice of Appeal - Dated May 1, 1985

GEORGE L. SCHNEIDER
ESSEX COUNTY PROSECUTOR
ESSEX COUNTY COURTS BUILDING
NEWARK, NEW JERSEY 07102
(201) 621-4683

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.

Civil Action

IN THE MATTER OF THE APPLICATIONS OF MIMS HACKETT, JR., FOR PERMITS TO PURCHASE HANDGUN AND CARRY HANDGUN AND A FIREARMS PURCHASER IDENTIFICATION CARD

NOTICE OF APPEAL

The State of New Jersey hereby appeals the Order of the Honorable Charles E. Villanueva, J.S.C., entered on April 23, 1985, which Order grants Mims Hackett, Jr. a permit to purchase a handgun, a

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purchaser identification card, and a permit to carry a handgun.

GEORGE L. SCHNEIDER
ESSEX COUNTY PROSECUTOR

BY:
MARC J. FRIEDMAN
ASSISTANT PROSECUTOR

The undersigned hereby certifies that the transcript of the hearings of March 11, 1985, April 1, 1985, and April 22, 1985 have been ordered from the appropriate court reporters.

_____
MARC J. FRIEDMAN

DATED: May 1, 1985

APPENDIX I

Appellate Division Opinion - Dated November 21, 1985

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4020-84T5

IN THE MATTER OF
MIMS HACKETT, JR.

Submitted October 29, 1985 -- Decided
Nov 21 1985

Before Judges Antell, Shebell and Matthews.

On appeal from the Superior Court, Law Division, Essex County.

George L. Schneider, Essex County Prosecutor, attorney for appellant, State of New Jersey, (Marc J. Friedman, Assistant County Prosecutor of counsel; Elizabeth A. Duelly, Assistant County Prosecutor, on the letter-brief.

Stephen J. Edelstein, attorney for respondent.

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PER CURIAM

The State appeals from an order permitting petitioner to purchase and carry a handgun and to possess a firearms purchaser identification card. Hackett had been convicted of kidnapping and assault in 1976. The kidnapping carried a mandatory 30 year sentence, and the case became a cause celebre. The outcome was that his sentence was commuted by then Governor Byrne. Before the commutation, however, and while in custody, Hackett petitioned in the federal courts for a writ of habeas corpus, and sometime later the court ruled that Hackett had been deprived of fundamental rights in connection with the calling of alibi witnesses. The accompanying order stated that the writ

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would issue unless Hackett was retried within 90 days. The retrial did not take place. The question presented now is whether or not the action by the federal district court had the effect of nullifying the convictions.

We are inclined to follow the opinion of this court in In the Matter of Hackett, 190 N.J. Super. 300 (1963) dealing with Hackett's right to a private detective's license. There we concluded that we were obliged to treat the conviction "as if it had been overturned on appeal," and we found it to be "void as to all collateral civil disabilities." 190 N.J. Super. at 311-312.

Affirmed.

I hereby certify that the foregoing is a

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true copy of the original on file in my office.

ELIZABETH McLAUGHLIN
Clerk

APPENDIX J

N.J. Supreme Court Order - Dated February 19, 1985

SUPREME COURT OF NEW JERSEY
C-500 SEPTEMBER TERM 1985

24,902

IN THE MATTER OF
MIMS HACKETT, JR.

ON PETITION FOR CERTIFICATION

(State of New Jersey)
Petitioner

To the Appellate Division, Superior Court:

A petition for certificaiton of a judgment in A-4020-84T5 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this

APPENDIX J

19th day of February, 1986.

STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT

A TRUE COPY
Stephen W. Townsend
CLERK

APPENDIX K

STATUTES INVOLVED

28 U.S.C. §2244:

§2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

(b) When after an evidentiary

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hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has

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not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find

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the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

28 U.S.C. §2254:

§2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the

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Constitution or laws or treaties of the United States.

N.J.S.A. 2C:39-5(a),(b), and (c):
2C: 39-5. Unlawful possession of weapons

a. Machine guns. Any person who knowingly has in his posession a machine gun or any instrument or device adaptable for use as a machine gun, without being licensed to do so as provided in section 2C:58-5, is guilty of a crime of the third degree.

b. Handguns. Any person who knowingly has in his possession any handgun, including any antique handgun without first having obtained a permit to carry the same as provided in section

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2C:58-4, is guilty of a crime of the third degree.

c. **Rifles and shotguns.** (1) Any person who knowingly has in his possession any rifle or shotgun without having first obtained a firearms purchaser identification card in accordance with the provisions of section 2C:58-3, is guilty of a crime of the third degree.

(2) Unless otherwise permitted by law, any person who knowingly has in his possession any loaded rifle or shotgun is guilty of a crime of the third degree.

N.J.S.A. 2C:39-7:
2C: 39-7. Certain persons not to have weapons

Any person, having been convicted in

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this State or elsewhere of the crime of aggravated assault, arson, burglary, escape, extortion, homicide, kidnapping, robbery, aggravated sexual assault, or sexual assault, whether or not armed with or having in his possession any weapon enumerated in section 2C:39-1 r., or any person who has ever been committed for a mental disorder to any hospital, mental institution or sanitarium unless he possesses a certificate of a medical doctor or psychiatrist licensed to practice in New Jersey or other satisfactory proof that he is no longer suffering from a mental disorder which interferes with or handicaps him in the handling of a firearm, or any person who has been convicted for the unlawful use,

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possession or sale of a controlled dangerous substance as defined in article 2 of P.L. 1970, c. 226 (C. 24:21-3 et seq.), who purchases, owns, possesses or controls any of the said weapons is guilty of a crime of the fourth degree.

Whenever any person shall have been convicted in another state, territory, commonwealth or other jurisdiction of the United States, or any country in the world, in a court of competent jurisdiction, of a crime which in said other jurisdiction or country is comparable to one of the crimes enumerated above, then that person shall be subject to the provisions of this section.

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N.J.S.A. 2C:58-3(a) through (e):

2C: 58-3. Purchase of firearms

a. Permit to purchase a handgun. No person shall sell, give, transfer, assign or otherwise dispose of, nor receive, purchase, or otherwise acquire a handgun unless the purchaser, assignee, donee, receiver or holder is licensed as a dealer under this chapter or has first secured a permit to purchase a handgun as provided by this section.

b. Firearms purchaser identification card. No person shall sell, give, transfer, assign or otherwise dispose of nor receive, purchase or otherwise acquire a rifle or shotgun, other than an antique rifle or shotgun, unless the purchaser, assignee, donee, receiver or holder is

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licensed as a dealer under this chapter or possesses a valid firearms purchaser identification card, and first exhibits said card to the seller, donor, transferor or assignor, and unless the purchaser, assignee, donee, receiver or holder signs a written certification, on a form prescribed by the superintendent, which shall indicate that he presently complies with the requirements of subsection c. of this section and shall contain his name, address and firearms purchaser identification card number or dealer's registration number. The said certification shall be retained by the seller, as provided in section 2C: 58-2 a., or, in the case of a person who is not a dealer, it may be filed with the chief of

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police of the municipality in which he resides or with the superintendent.

c. **Who may obtain.** No person of good character and good repute in the community in which he lives, and who is not subject to any of the disabilities set forth in this section or other sections of this chapter, shall be denied a permit to purchase a handgun or a firearms purchaser identification card, except as hereinafter set forth. No handgun purchase permit or firearms purchaser identification card shall be issued:

(1) To any person who has been convicted of a crime, whether or not armed with or possessing a weapon at the time of such offense;

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(2) To any drug dependent person as defined in P.L. 1970, c. 226 (C. 24:21-2), to any person who is confined for a mental disorder to a hospital, mental institution or sanitarium, or to any person who is presently an habitual drunkard;

(3) To any person who suffers from a physical defect or disease which would make it unsafe for him to handle firearms, to any person who has ever been confined for a mental disorder, or to any alcoholic unless any of the foregoing persons produce a certificate of a medical doctor or psychiatrist licensed in New Jersey, or other satisfactory proof, that he is no longer suffering from that particular disability in such a manner that would interfere with or handicap him in the

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handling of firearms; to any person who knowingly falsifies any information on the application forms for a handgun purchase permit or firearms purchaser identification card;

(4) To any person under the age of 18 years; or

(5) To any person where the issuance would not be in the interest of the public health, safety or welfare.

d. Issuance. The chief of police of an organized full-time police department of the municipality where the applicant resides or the superintendent, in all other cases, shall upon application, issue to any person qualified under the provisions of subsection c. of

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this section a permit to purchase a handgun or a firearms purchaser identification card.

Any person aggrieved by the denial of a permit or identification card may request a hearing in the Superior Court of the county in which he resides if he is a resident of New Jersey or in the Superior Court of the county in which his application was filed if he is a nonresident. The request for a hearing shall be made in writing within 30 days of the denial of the application for a permit or identification card. The applicant shall serve a copy of his request for a hearing upon the chief of police of the municipality in which he resides, if he is a resident of New Jersey, and upon the

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superintendent in all cases. The hearing shall be held and a record made thereof within 30 days of the receipt of the application for such hearing by the judge of the Superior Court. No formal pleading and no filing fee shall be required as a preliminary to such hearing. Appeals from the results of such hearing shall be in accordance with law.

e. Applications. Applications for permits to purchase a handgun and for firearms purchaser identification cards shall be in the form prescribed by the superintendent and shall be set forth the name, residence, place of business, age, date of birth, occupation, sex and physical description, including

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distinguishing physical characteristics, if any, of the applicant, and shall state whether the applicant is a citizen, whether he is an alcoholic, habitual drunkard, drug dependent person as defined in P.L. 1970, c. 226 (C. 24:21-2), whether he has ever been confined or committed to a mental isntitution or hospital for treatment or observation of a mental or psychiatric condition on a temporary, interim or permanent basis, giving the name and location of the institution or hospital and the dates of such confinement or commitment, whether he has been attended, treated or observed by any doctor or psychiatrist or at any hospital or mental institution on an inpatient or outpatient basis for any mental or

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psychiatric condition giving the name and location of the doctor, psychiatrist, hospital or institution and the dates of such occurrence, whether he presently or ever has been a member of any organization which advocates or approves the commission of acts of force and violence to overthrow the Government of the United States or of this State, or which seeks to deny others their rights under the Constitution of either the United States or the State of New Jersey, whether he has ever been convicted of a crime or disorderly persons offense, and such other information as the superintendent shall deem necessary for the proper enforcement of this chapter. For the purpose of complying with this subsection, the applicant shall waive any

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statutory or other right of confidentiality relating to institutional confinement. The application shall be signed by the applicant and shall contain as reference the names and addresses of two reputable citizens personally acquainted with him.

Application blanks shall be obtainable from the superintendent, from any other officer authorized to grant such permit or identification card, and from licensed retail dealers.

The chief police officer or the superintendent shall obtain the fingerprints of the applicant and shall have them compared with any and all records of fingerprints in the municipality and county in which the applicant resides and

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also the records of the State Bureau of Identification and the Federal Bureau of Investigation, provided that an applicant for a handgun purchase permit who possesses a valid firearms purchaser identification card, or who has previously obtained a handgun purchase permit from the same licensing authority for which he was previously fingerprinted, and who provides other reasonably satisfactory proof of his identity, need not be fingerprinted again; however, the chief police officer or the superintendent shall proceed to investigate the application to determine whether or not the applicant has become subject to any of the disabilities set forth in this chapter.

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N.J.S.A. 2C:58-4:

2C:58-4. Permits to carry handguns

a. Scope and duration of authority. Any person who holds a valid permit to carry a handgun issued pursuant to this section shall be authorized to carry a handgun in all parts of this State, except as prohibited by section 2C:39-5e. One permit shall be sufficient for all handguns owned by the holder thereof, but the permit shall apply only to a handgun carried by the actual and legal holder of the permit.

All permits to carry handguns shall expire 2 years from the date of issuance or, in the case of an employee of an armored car company, upon termination of his employment by the company occurring

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prior thereto whichever is earlier in time, and they may thereafter be renewed every 2 years in the same manner and subject to the same conditions as in the case of original applications.

b. Application forms. All applications for permits to carry handguns, and all applications for renewal of such permits, shall be made on the forms prescribed by the superintendent. Each application shall set forth the full name, date of birth, sex, residence, occupation, place of business or employment, and physical description of the applicant, and such other information as the superintendent may prescribe for the determination of the applicant's

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eligibility for a permit and for the proper enforcement of this chapter. The application shall be signed by the applicant under oath, and shall be indorsed by three reputable persons who have known the applicant for at least 3 years preceding the date of application, and who shall certify thereon that the applicant is a person of good moral character and behavior.

c. Investigation and approval. Each application shall in the first instance be submitted to the chief police officer of the municipality in which the applicant resides, or to the superintendent, (1) if the applicant is an employee of an armored car company, or (2)

APPENDIX K

if there is no chief police officer in the municipality where the applicant resides, or (3) if the applicant does not reside in this State. The chief police officer, or the superintendent, as the case may be, shall cause the fingerprints of the applicant to be taken and compared with any and all records maintained by the municipality, the county in which it is located, the State Bureau of Identificaiton and the Federal Bureau of Identification. He shall also determine and record a complete description of each handgun the applicant intends to carry.

No application shall be approved by the chief police officer or the superintendent unless the applicant demonstrates that he is not subject to any

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of the disabilities set forth in 2C:58-3c., that he is thoroughly familiar with the safe handling and use of handguns, and that he has a justifiable need to carry a handgun. If the application is not approved by the chief police officer or the superintendent within 60 days of filing, it shall be deemed to have been approved, unless the applicant agrees to an extension of time in writing.

d. Issuance by Superior Court; fee. If the application has been approved by the chief police officer or the superintendent, as the case may be, the applicant shall forthwith present it to the Superior Court of the county in which the applicant resides, or to the Superior

APPENDIX K

Court in any county where he intends to carry a handgun, in the case of a nonresident or employee of an armored car company. The court shall issue the permit to the applicant if, but only if, it is satisfied that the applicant is a person of good character who is not subject to any of the disabilities set forth in section 2C:58-3c., that he is thoroughly familiar with the safe handling and use of handguns, and that he has a justifiable need to carry a handgun. The court may at its discretion issue a limited-type permit which would restrict the applicant as to the types of handguns he may carry and where and for what purposes such handguns may be carried. At the time of issuance, the applicant shall pay to the county clerk of

APPENDIX K

the county where the permit was issued a permit fee of $20.00.

e. Appeals from denial of applications. Any person aggrieved by the denial by the chief police officer or the superintendent of approval for a permit to carry a handgun may request a hearing in the Superior Court of the county in which he resides or in any county in which he intends to carry a handgun, in the case of a nonresident, by filing a written request for such a hearing within 30 days of the denial. Copies of the request shall be served upon the superintendent, the county prosecutor and the chief police officer of the municipality where the applicant resides, if he is a resident of this State.

APPENDIX K

The hearing shall be held within 30 days of the filing of the request, and no formal pleading or filing fee shall be required. Appeals from the determination at such a hearing shall be in accordance with law and the rules governing the courts of this State.

If the superintendent or chief police officer approves an application and the Superior Court denies the application and refuses to issue a permit, the applicant may appeal such denial in accordance with law and the rules governing the courts of this State.

f. Revocation of permits. Any permit issued under this section shall be void at such time as the holder thereof

APPENDIX K

becomes subject to any of the disabilities set forth in section 2C:58-3c., and the holder of such a void permit shall immediately surrender the permit to the superintendent who shall give notice to the licensing authority.

Any permit may be revoked by the Superior Court, after hearing upon notice to the holder, if the court finds that the holder is no longer qualified for the issuance of such a permit. The county prosecutor of any county, the chief police officer of any municipality, the superintendent or any citizen may apply to the court at any time for the revocation of any permit issued pursuant to this section.

APPENDIX K

N.J.S.A. 2A:170-26 (repealed September 1, 1979):

2A:170-26. Assault; assault and battery

Any person who commits an assault or an assault and battery is a disorderly person.

N.J.S.A. 2A:118-1 (repealed September 1, 1979)

2A:118-1. Kidnapping; demanding ransom

Any person who kidnaps or steals or forcibly takes away a man, woman or child, and sends or carries, or with intent to send or carry, such man, woman or child to any other point within this state, or into another state, territory or country, or forces, persuades or entices a child within the age of 14 years to leave its

APPENDIX K

father, mother or guardian, or other person intrusted with its care, and secretes or conceals the child, or who procures any such act to be done, is guilty of a high misdemeanor, and shall be punished by imprisonment for life, or for such other term of not less than 30 years as the court deems proper.

Any person who kidnaps or steals or forcibly takes away a man, woman or child, as aforesaid and demands for the return of such man, woman or child, money or any thing of value, is likewise guilty of a high misdemeanor, and upon conviction shall suffer death, unless the jury by their verdict, and as a part thereof, upon and after consideration of all the evidence, recommends imprisonment for

APPENDIX K

life, in which case this and no greater punishment shall be imposed.

85-1730

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF NEW JERSEY,

Petitioner,

vs.

MIMS HACKETT, JR.,

Respondent.

On Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF NEW JERSEY,

Petitioner,

vs.

MIMS HACKETT, JR.,

Respondent.

On Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter-Statement of the Case

The respondent, Mims Hackett, Jr., was indicted on May 4, 1976 by an Essex County Grand Jury, and was charged in four counts with the crimes of atrocious assault and battery, kidnapping and threatening to take the life of another. Hackett entered pleas of not guilty to all of the charges (Appendix A, A1a).

Hackett was tried by jury and was found guilty of simple assault and battery (N.J.S.A. 2A:170-26), a disorderly persons offense, and kidnapping (N.J.S.A. 2A:118-1), then a high misdemeanor.[1] Hackett was sentenced to the then mandatory term of 30 to 31 years for kidnapping and to a concurrent sentence of 6 months for the assault (Appendix B, A6a to A7a).

On January 4, 1977, Hackett filed a Notice of Appeal to the Appellate Division of the Superior Court of New Jersey. The matter was remanded to permit Hackett to move for a new trial, which application was denied. Hackett then filed an Amended Notice of Appeal and his conviction was affirmed in June 1978 (R1a to R2a). In September, 1978, the New Jersey Supreme Court denied certification (Appendix D, A19a). *State* v. *Hackett,* 78 N.J. 332, 395 A.2d 200 (1978).

Subsequent to the Supreme Court's denial of certification, Hackett began serving his sentence. On October 19, 1978, and while in custody, Hackett filed a Petition for Writ of *Habeas Corpus* pursuant to 28 U.S.C. §2254 in the United States District Court for the District of New Jersey (R2a).

In February, 1979, and prior to a determination of his pending *habeas* application, then Governor Brendan Byrne commuted Hackett's sentence and reduced it from 30 to 31 years to 2 to 3 years (R2a). As a result of the commutation of his sentence, Hackett was released on parole on July 17, 1979 (R2a).

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[1] N.J.S.A. 2A:118-1 was repealed September 1, 1979. Under current New Jersey law kidnapping is a crime of the second degree, if the victim is released unharmed and in a safe place prior to apprehension, and if not, it is a crime of the first degree. N.J.S.A. 2C:13-1.

On July 31, 1980, over one year later, the United States District Court ruled that Hackett had been deprived of his fundamental rights and due process of law because the trial judge had refused to allow him to call alibi witnesses. *Hackett* v. *Mulcahy,* 493 F. Supp. 1329 (D. N.J. 1980). The Court ordered that a writ of *habeas corpus* issue unless the State commenced retrial proceedings against Hackett within ninety days (R4a to R5a).

The State then filed a Notice of Appeal from the grant of *habeas* to the United States Court of Appeals, Third Circuit, which was later withdrawn, and the appeal dismissed on September 22, 1980. Hackett was also advised by the Essex County Prosecutor's Office that they did not intend to retry him (R6a, R8a).

Prior to 1976, Hackett had been licensed by the State of New Jersey as a private detective. In conjunction with his work as a private detective, Hackett was issued a permit to carry a handgun in 1969. The carry permit was annually renewed until 1975, except for 1970. After Hackett's 1976 indictment, he did not then seek any renewal of his permit to carry or of his private detective's license (Appendix G, A66a to A67a).

In 1981, after the grant of *habeas* relief, Hackett again applied for a private detective's license. The Division of State Police initially denied the application on the basis that Hackett's state conviction created a regulatory disqualification for licensure. Following a requested hearing by the Office of Administrative Law, where it was determined that the denial was appropriate, and a further determination by the Superintendent of State Police not

to issue the license, Hackett appealed to the Superior Court of New Jersey, Appellate Division. The Appellate Division reversed and remanded the matter to the Division of State Police for reconsideration of Hackett's application for a private detective's license as if the record of the kidnapping conviction did not exist. *Matter of Hackett,* 190 N.J. Super. 300, 313 (App. Div. 1983) (Appendix G, A67a to A68a).

Subsequent to the ruling of the Appellate Division, which was unchallenged, Hackett was issued a private detective's license by the State Police (Appendix G, A68a).

On July 24, 1984, Hackett submitted applications for permits to purchase a handgun and to carry a handgun to the Chief of Police of Orange, New Jersey. Thereafter, he submitted another application for a firearms purchaser identification card. Hackett was advised in January of 1985 that all of the applications had been disapproved by the Chief of Police. Thereafter, Hackett requested a hearing in the Superior Court of New Jersey, Law Division, pursuant to N.J.S.A. 2C:58-3(d). By Opinion and Order of April 23, 1985, all the permits were granted (Appendices F and G).

Thereafter, the State of New Jersey filed a Notice of Appeal to the Superior Court, Appellate Division, which resulted in the affirmance of the granting of the permits (Appendix H, A87a). The State's subsequent petition for certification to the New Jersey Supreme Court was denied on February 19, 1986 (Appendix J, A93a).

POINT I

The Court lacks jurisdiction to review this matter

The State has invoked the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3), which provides for review by the Supreme Court:

> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question . . . or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The State argues that the Superior Court of New Jersey, Appellate Division believed that federal law required that it reach the decision which it made twice, namely that the collateral consequences of Hackett's state conviction were removed by the federal grant of *habeas* relief. Therefore, according to the State, the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law . . ." *Michigan* v. *Long,* 463 U.S. 1032, 1040 (1983).

Since the grant of *habeas* relief, Hackett has applied for and been granted a private detective's license and various firearms permits. In connection with his application for a private detective's license, which was initially denied by the Division of State Police on the basis that his conviction created a regulatory disqualification for licensure, the Superior Court of New Jersey, Appellate Division held that Hackett's conviction was to be treated as if it had been overturned on appeal and was therefore

void as to all collateral civil disabilities. *Matter of Hackett, supra.*

In reaching its determination, the Appellate Division did not believe that either federal law mandated its decision or that the federal *habeas* revised its state conviction. The Court specifically stated at pages 306-307 that:

> "The relief which Hackett seeks on this appeal seems to be precisely the relief the petitioner sought and obtained from the Georgia Supreme Court in *Cooper* v. *State,* namely, an adjudication that a conviction obtained in violation of a federal constitutional right cannot fairly be used by the State to diminish his rights as a citizen. This relief, as noted in *Fay* v. *Noia* (citation omitted), is unavailable in a federal court on *habeas,* which 'cannot revise the state court judgment; it can act only on the body of the petitioner.' *The question before us is whether that relief should be available in this state proceeding.*" (Emphasis added).

Similarly, in granting Hackett's applications for firearms permits, the trial court noted that:

> "The actual setting aside of a state court conviction is unavailable in a federal court on *habeas* which 'cannot revise the state court judgment; it can act only on the body of the petitioner.' *Fay* v. *Noia.* This is so because a *habeas corpus* proceeding directed at a judgment of conviction is a collateral attack on such judgment. *State* v. *Cynkowski,* 19 N.J. Super. 243, 250 (App. Div. 1952), aff'd 10 N.J. 571 (1952)." (Appendix G, A82a to A83a).

In affirming the trial court's determination with respect to the firearms permits, the Superior Court of New Jersey, Appellate Division, relied upon its prior holding in *Matter of Hackett, supra* (Appendix I, A91a).

The New Jersey Courts did not rely on federal law in reaching its decisions, as they did not believe that the federal *habeas* ruling revised the state judgment of conviction. The Court's motivations for its ruling were clearly delineated in *Matter of Hackett, supra,* at page 312, as follows. First, Hackett's conviction could not be used for impeachment purposes under N.J.S.A. 2A:81-12. Second, the District Court granted the writ because Hackett was precluded from presenting his defense. Therefore, the reliability of the facts supporting the conviction was inherently suspect. Third, Hackett was restored in 1981 to his position as a public school teacher, with retroactive reinstatement of all his tenure and pension rights, and the Court believed it would have ". . . create(d) an insensitive irony if (it) held that Hackett, deemed fit to teach children in the public schools, could not even receive the consideration of a fair investigation and evaluation in his quest for a private detective's license."

Since the decisions of the Superior Court of New Jersey, Appellate Division were made on independent state grounds, and not federal law, this Court lacks jurisdiction and the Petition for Writ of Certiorari should be denied.

POINT II

The granting of the Writ of Habeas Corpus removed the collateral consequences of respondent's state judgment of conviction.

The facts in this case may be unique, but they do not present the legal issues posed by appellant in it's Petition for Writ of Certiorari. As argued in Point I, *supra,* the State of New Jersey did not find that it was mandated to relieve Hackett of the civil disabilities flowing from his state conviction by virtue of the issuance of the federal writ of *habeas.* Rather, the State independently exercised its power to grant this collateral relief.

However, if the State had not chosen to do, the repondent submits that the same result is required by federal law.

Respondent does not dispute that historically the sole purpose of the writ of *habeas corpus* was to test the legality of a prisoner's current detention, and that the sole relief which could be granted by the issuance of the writ was the prisoner's release from an illegal confinement. *Fain* v. *Duff,* 488 F.2d 218 (5 Cir. 1973), cert. den. 421 U.S. 999 (1975); *Zaffarano* v. *Fitzpatrick,* 404 F.2d 474 (2 Cir. 1968), cert. den. 395 U.S. 977 (1969).

However, the great writ is not a "static, narrow, formalistic remedy." *Foster* v. *Gilbert,* 264 F. Supp. 209, 212 (S.D. Fla. 1967).

It is clear that the access to habeas relief has been expanded by the liberal interpretation of the "in custody" requirement of 28 U.S.C. §2241(c). *Foster* v. *Gilbert, Id.*; *Hammond* v. *Lenfest,* 398 F.2d 705 (2 Cir. 1968); *Hackett*

v. *Mulcahy,* 493 F. Supp. 1329 (D. N.J. 1980); *Pringle* v. *Court of Common Pleas,* 744 F.2d 297 (3 Cir. 1984).

Federal jurisdiction is not terminated with respect to a *habeas* application even when the petitioner has been unconditionally released from custody prior to adjudication. *Carafas* v. *LaVallee,* 39 U.S. 234 (1968). Prior to *Carafas,* a petition was mooted if a petitioner was released from custody prior to a decision on the merits. *Parker* v. *Ellis,* 362 U.S. 574 (1960).

The next logical step must be that relief other than release from custody is granted by issuance of a writ of *habeas*, especially when the petitioner has been released from custody prior to adjudication. If this is not so, the federal court's consideration of these petitions would be a meaningless exercise and a staggering waste of judicial resources.

This view is not unsupported by case law, which has recognized that the remedies available to a *habeas* petitioner can be other than release from custody. As noted by the Court in *United States ex rel. Hickey* v. *Jeffes,* 571 F.2d 762 (3 Cir. 1978) at page 765: "And while some form of custody may be deemed jurisdictional for federal habeas corpus, 'the statute does not deny the federal courts power to fashion appropriate relief other than immediate release.' (Citation omitted)." This view had been earlier espoused in *Carafas* at page 238:

> "But the statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that '(t)he court shall * * * dispose of the matter as law and

> justice require. 28 U.S.C. §2243. The 1966 amendments to the habeas corpus statute seem specifically to contemplate the possibility of relief other than immediate release from physical custody."

In numerous cases dealing with the liberalization of the "in custody" requirement, the reason given for not mooting the petition is the recognition that many individual rights are affected by a criminal conviction. In *Carafas,* this Court stated at pages 237 to 239:

> "It is clear that petitioner's case is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these disabilities or burdens (which) may flow from petitioner's conviction, he has '*a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.*' On account of these 'collateral consequences' the case is not moot." (Citations omitted). (Emphasis supplied).
>
> * * *
>
> ". . . Petitioner is entitled to consideration of his application for relief on its merits. He is suffering, and will continue to sufer, serious disabilities because of the law's complexities and not because of his fault, if his claim that he has been illegally convicted is meritorious. There is no need in the statute, the Constitution, or sound jurisprudence for denying to petitioner his ultimate day in court."

Also see *Brown* v. *Resor*, 407 F.2d 281 (1969), cert. den. 399 U.S. 933 (1970); *Matthews* v. *State of Florida*, 463 F.2d 679 (1972); *Mizell* v. *Attorney General of N.Y.*, 586 F.2d 942 (2 Cir. 1978), cert. den. 440 U.S. 967 (1979); *Pringle* v. *Court of Common Pleas, supra.*

The appellant recognizes that fundamental rights, such as the right to vote, may not be denied after the granting of a petition for writ of *habeas corpus*. However, it argues that disabilities arising from the state court conviction survived the granting of the writ for state licensing purposes. No cited case makes this distinction. Moreover, the list of disabilities elucidated in *Carafas* refers both to voting and licensing for business.

The appellant also suggests that, in liberalizing the "in custody" requirement, this Court merely recognized that as a result of its action more persons would be able to file petitions, more petitions would be granted, and more retrials would take place in the state courts. The appellant states that the removal of collateral consequences would come about by acquittal at retrial, rather than by operation of the writ.

However, the State, in its analysis, does not deal with the facts presented in the instant case—namely, that the grant of the writ was unchallenged. The State had the opportunity to retry Hackett and declined to do so. It also could have proceeded with its appeal from the District Court's Order granting *habeas* relief, instead of withdrawing it.[2]

---

[2] It should be noted that the Appellate Division's ruling in the *Matter of Hackett, supra,* dealing with the respondent's private detective licensure, was also not challenged by the State.

The respondent, under the State's theory, could never have the collateral consequences of his conviction removed. As the State did not retry him, a decision solely within its domain, he would be branded for life with the consequences of a conviction which was unconstitutionally obtained.[3] This would be fundamentally unfair and could not be the result contemplated by this Court.

The view that issuance of a writ of *habeas corpus* has consequences beyond simply releasing the prisoner has been affirmed. In *Rimmer* v. *Fayetteville Police Dept,* 567 F.2d 273, 276-277 (4 Cir. 1977), the Court stated:

> "When, after exhaustion of state court remedies, a prisoner succeeds in an action under §2254, he is the ultimate victor. While the state court judgment is neither reversed nor vacated, the prisoner is released and the state court judgment authoritatively declared void. Thereafter, the state court judgment should have no preclusive effect."

Echoing this view, the Third Circuit in *United States ex rel. Hickey* v. *Jeffes, supra,* at pages 764-765 said:

> "Certainly we must presume, (citations omitted), that there are present and future collateral consequences, in addition to present custody, flowing from the invalid conviction . . . The district court has the statutory authority to relieve Hickey from the collateral consequences, whatever they may be, of an unconstitutional conviction even though it

---

[3] The kidnapping conviction could not be expunged. N.J.S.A. 2C:52-2(b).

> would not disturb the general sentence which is sustainable on other counts."

In *Bently* v. *Florida,* 285 F. Supp. 494 (S.D. Fla. 1968), the court granted the writ to a petitioner who had been denied the effective assistance of counsel. The relief granted by the Court was a vacation of the conviction, believing it would be unjust to order a new trial because the petitioner had completed his sentence. Likewise, in *Grandison* v. *Warden, Maryland House of Correction,* 423 F. Supp. 112 (D. Md. 1976), the district court noted that it had the authority in a *habeas* proceeding to order the expungement of petitioner's records against all persons who maintained custody of them.

This Court's post *Carafas* decisions, relied upon by the appellant, are either not inconsistent with the respondent's position or irrelevant to the issues at hand.

In *Hensley* v. *Municipal Court,* 411 U.S. 435 (1973), the issue before this Court was whether an individual subject to a conviction, who is released on his own recognizance, was "in custody" within the meaning of the federal *habeas corpus* statute. The determination was that the custody requirement was met. In *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973), the Court held that when a state prisoner, though asserting jurisdiction under the Civil Rights Act, is challenging the very fact or duration of his imprisonment, and the relief sought is a determination that he is entitled to immediate or speedier release from imprisonment, his sole federal remedy is a writ of *habeas corpus.* Finally, in *Stone* v. *Powell,* 428 U.S. 465 (1976), this Court held that a state prisoner could not be granted *habeas* relief on grounds that evidence obtained through unconsti-

tutional search and seizure was introduced at his trial, where the state had provided an opportunity for full and fair litigation of the Fourth Amendment claim. In the instant case, the District Court found that Hackett had been denied the right to present witnesses in his own defense in contravention of the Sixth Amendment.

However, a post *Carafas* decision of this Court, not relied upon by the appellant, supports the respondent's position. In *North Carolina* v. *Rice,* 404 U.S. 244 (1971), this Court noted that a *habeas* challenge to an invalid sentence (instead of an invalid conviction) may be mooted if the petitioner had served the sentence because collateral consequences flow from the conviction and not the sentence. The matter was remanded to determine whether there may be collateral consequences that flow specifically from an invalid sentence when the conviction is valid. At pages 247 and 248, the Court reaffirmed that: "A number of disabilities may attach to a convicted defendant even after he has left prison, and the Court has recognized the standing of such persons to challenge the legality of their convictions even when their sentences have been served."

CONCLUSION

For the reasons stated above, respondent, Mims Hackett, Jr., respectfully requests that this Court deny the Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

SCHWARTZ, PISANO, SIMON & EDELSTEIN
Attorneys for Respondent

By LAURA BERTOLLO

Dated: July 29, 1986

[APPENDIX FOLLOWS]

APPENDIX

Stipulation of Facts (April 1, 1985) (Exhibit J-1)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION ESSEX COUNTY

In the Matter of the Denial of Application of MIMS HACKETT, JR. for permits to purchase handgun, carry handgun, and for firearms identification card.

The foregoing facts are hereby stipulated and agreed between the parties hereto:

1. Mims Hackett, Jr. was indicted by an Essex County Grand Jury (Indictment No. 313775) on May 4, 1976 and charged in four counts with the crimes of atrocious assault and battery, kindnapping, and threatening to take the life of another. He pleaded not guilty to all charges.

2. On November 10, 1976, after trial by jury, Hackett was found guilty of simple assault and battery, contrary to N.J.S.A. 2A:170-26, a disorderly persons offense, and kidnapping, contrary to N.J.S.A. 2A:118-1, then a high misdeameanor.

3. On January 4, 1977, Hackett was sentenced to the then mandatory term of 30 to 31 years for kidnapping and to a concurrent sentence of six months for the assault.

4. On January 4, 1977, Hackett filed a Notice of Appeal with the Appellate Division of the Superior Court of New

Jersey. On June 2, 1977, the Appellate Division remanded the matter for the sole purpose of permitting Hackett to move before the trial court for a new trial on the basis of newly discovered evidence. Hackett's Motion for a new trial was denied on August 17, 1977.

5. An amended Notice of Appeal was then filed with the Appellate Division on August 25, 1977. On June 19, 1978, the Appellate Division affirmed Hackett's conviction.

6. A Petition for Certification was filed with the New Jersey Supreme Court on July 3, 1978 and was denied on September 19, 1978.

7. Following the Supreme Court's denial of Certification, Hackett began serving his sentence. On October 19, 1978, he filed a Petition of Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the District of New Jersey.

8. On February 22, 1979, Governor Brendan T. Byrne signed an Order for commutation of Hackett's sentence, reducing it from 30 to 31 years to 2 to 3 years.

9. Hackett was paroled on July 17, 1979.

10. By Opinion and Order filed July 31, 1980, the United States District Court for the District of New Jersey ordered the State of New Jersey to commence retrial proceedings against Hackett within 90 days and further ordered that unless such proceedings were commence a writ of habeas corpus would issue.

11. The State of New Jersey withdrew a Notice of Appeal of the Order of the United States District Court of July 31, 1980, and an Order was entered by the District

Stipulation of Facts (April 1, 1985) (Exhibit J-1)

Court on September 22, 1980 dismissing the appeal. By letter dated September 25, 1980 from the Essex County Prosecutor's Office to Hackett's attorneys, Hackett was informed that the State of New Jersey had withdrawn its Notice of Appeal of the District Court action and that the Essex County Prosecutor's Office did not intend to retry him.

Dated: April 1, 1985

STEPHEN J. EDELSTEIN
Attorney for Mims Hacket, Jr.

By: LAURA BERTOLLO

ESSEX COUNTY PROSECUTOR

By: KENNETH P. PLY

Order

(Filed July 31, 1980)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 78-2529

MIMS HACKETT,

Petitioner,

v.

ROBERT MULCAHY and the ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

This matter having come before the Court on petitioner's petition pursuant to Title 28 United States Code §2254 for a Writ of Habeas Corpus, and the Court having reviewed the record, and for the reasons set forth in an Opinion filed this date, having determined that petitioner is in the custody of the State of New Jersey in violation of the laws of the United States;

It is on this 31st day of July, 1980,

ORDERED that the State of New Jersey commence retrial proceedings against petitioner within ninety days and it is further

Order

ORDERED that unless such proceedings are commenced, a Writ of Habeas Corpus shall issue.

HERBERT J. STERN
United States District Judge

I hereby certify that the foregoing
is a TRUE COPY of the original on file
in my office.

ANGELO W. LOCASCIO, Clerk
By: WILLIAM J. HOLLSNEL, JR., Deputy

Order Dismissing Appeal

(Filed—September 22, 1980)

John J. Degnan
Attorney General of New Jersey
By: Donald S. Colburn
Essex County Prosecutor
Essex County Courts Buildng
Newark, New Jersey 07102
(201) 961-7470

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 78-2529

UNITED STATES OF AMERICA, ex rel.
MIMS HACKETT,

Petitioner,

v.

ROBERT MULCAHY and the ATTORNEY GENERAL
OF THE STATE OF NEW JERSEY,

Respondents.

Upon application of the respondents, it is on this 22 day of September, 1980;

ORDERED that the appeal filed by the respondents be and hereby is dismissed.

HERBERT J. STERN
United States District Judge

Order Dismissing Appeal

I hereby certify that the foregoing
is a TRUE COPY of the original on file
in my office.

ANGELO W. LOCASCIO, Clerk
By: WILLIAM J. HOLLSNEL, JR., Deputy

Letter dated September 25, 1980 from John S. Redden to Paul Montabano (Exhibit J-14)

[Letterhead of Essex County Prosecutor]

September 25, 1980

Paul Montalbano, Esq.
Schneider, Cohen & Solomon, Esqs.
591 Summit Avenue
Jersey City, New Jersey 07306

Re: *Mims Hackett* v. *Robert Mulcahy, et al.*

Dear Mr. Montalbano:

Please be advised that the State of New Jersey has withdrawn the Notice of Appeal filed in this matter. In addition, the Essex County Prosecutor's Office does not intend to retry Mims Hackett at this time.

Very truly yours,

John S. Redden
Assistant Essex County Prosecutor

JSR:sew